# STATE OF MICHIGAN

# COURT OF APPEALS

*In re* L. B. N. BURBANKS, Minor.

UNPUBLISHED
August 13, 2020

No. 352286
Washtenaw Circuit Court
Family Division
LC No. 17-000149-NA

Before: MURRAY, C.J., and CAVANAGH and SWARTZLE, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(c)(*i*) (conditions of adjudication continue to exist), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood that child will be harmed if returned to the parent). We affirm.

This case began with a petition filed by the Department of Health and Human Services (the DHHS) against the child's mother. At the time the petition was filed, the child had no legal father. However, the DHHS alleged that the putative father assaulted the mother and that the mother admitted that the putative father had assaulted her on multiple occasions. The petition was filed against the mother because the child was born with cocaine in his system, and the mother had appeared highly intoxicated on multiple occasions during her pregnancy with the child. The child was ultimately placed in the care of the DHHS.

Then, in June 2018, respondent became involved in this case because he signed an affidavit of parentage. As a result, the DHHS filed a supplemental petition against respondent because he had not provided financial or material support to the child since the child's birth. The DHHS also alleged that respondent refused to sign an affidavit of parentage in May 2018 because he did not want to be involved with the DHHS. The petition also contained allegations of past physical abuse from respondent toward one of his other children, as well as the mothers of his other children. As a result, the child was kept in the custody of the DHHS. In an August 2018 hearing, Ramona Lyons of the DHHS testified about respondent's criminal history of domestic violence and how his parental rights were terminated to four other children because of physical and emotional abuse. Lyons also testified about respondent's previous involvement with the DHHS and how he had not benefited from services previously offered.

Between August 2018 and May 2019, respondent requested and received supervised parenting time with the child. Respondent also pleaded to several of the allegations contained in the supplemental petition. Respondent admitted that he had not provided any financial or material support to the child since the child's birth and that he did not provide proper care and custody to the child since the child's birth. Respondent further admitted that his parental rights were terminated to four of his other children, that he had been provided services from the DHHS in the past, and that he had a criminal history of domestic violence.

During a May 2019 hearing, the trial court became aware that respondent was incarcerated for a domestic violence against his current partner.[1] The trial court noted that the child had been in care for almost 17 months and that respondent "has done little to nothing on his treatment plan." The trial court also noted that the DHHS provided several services to respondent in an attempt to reunify the family, such as "[r]eferrals for psychological evaluation, ADA program,[2] Parenting Classes, Supervised Visits, [and] drug screen for father." A few months later, respondent pleaded guilty to assault with intent to cause great bodily harm less than murder in exchange for "a three to ten year sentence." In October 2019, the DHHS filed a supplemental petition seeking termination of respondent's parental rights.

During the termination hearing, Wendy Kent of the DHHS testified that she developed a case service plan for respondent, which included verification of stable housing and income, as well as attendance in substance abuse programs and mental health evaluations. Respondent did not comply with any of the case service plan other than completion of the shortened version of the ADA program. Kent testified that respondent's compliance with the case service plan was poor and that he did not show any benefit from the services offered. A member from Catholic Social Services, April Greenlee, also testified that respondent was "minimally compliant with referred services and was not as cooperative with certain services until incarcerated." She also stated that respondent did not benefit from the case service plan because, even though there was completion of the ADA program, respondent later pleaded to assault with intent to cause great bodily harm less than murder against his current partner.

With respect to best interests, Greenlee testified that respondent had no bond with the child because respondent was never able to parent the child alone; the supervised parenting time was with his current partner, the child, and respondent's four other children. Greenlee testified that the child needed "long-term permanent stability" and that there was a risk that the child could experience physical as well as emotional harm if returned to respondent. Greenlee stated that the child was doing very well in his placement and that all of his health conditions had improved. Greenlee further stated that the foster home provided the permanency and stability the child needed, and indicated that respondent would not be able to provide care because of his current incarceration. She also testified that respondent had not been a parent to the child since the child's birth.

[1] The mother of the child at issue here passed away in 2018.

[2] Alternatives to Domestic Aggression program.

Respondent testified about times when he was not incarcerated and tried to find counseling and housing, as well as complete a long-term ADA program. He testified about his participation in the ADA program and how he benefited this time because "like back in the past I would just sit there. You know, like I can't wait till this class end. But, this time I actually sat there and participated." Respondent also stated that he was taking medications for depression and that he was diagnosed with post-traumatic stress disorder (PTSD), bipolar disorder, and attention-deficit/hyperactivity disorder (ADHD). Respondent admitted that he had a problem with violence against women and that he wanted to receive help and learn how to talk about it to cure the problem. He admitted that he did not care enough in the past to fix the problem.

Ultimately, the trial court found that statutory grounds supporting termination existed by clear and convincing evidence. Notably, as the trial court rendered its opinion, respondent had a violent outburst and cursed several times on the record. Respondent also stated, "You took 'em, you can have 'em" with respect to the child. With regard to best interests, the trial court determined that the child did not have a bond with respondent, that respondent lacked parenting ability, and that the child needed permanency, stability, and finality. The trial court further found that it was in the child's best interests to terminate respondent's parental rights because the foster parents provided a "safe, stable, loving, and attentive home" and that respondent had an unabated history of violence, with the trial court pointing to his previous convictions and outburst during the trial court's oral opinion. This appeal followed.

Respondent's sole argument on appeal is that trial court clearly erred when it terminated his parental rights because reasonable efforts were not made to accommodate his depression, ADHD, PTSD, and bipolar disorder in violation of the Americans with Disabilities Act, 42 USC 12101 *et seq*. We disagree.

We generally review for clear error a trial court's decision regarding reasonable efforts. *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005). However, respondent raised the issue of ADA accommodation for the first time on appeal; thus, the issue is not preserved. See *In re Terry*, 240 Mich App 14, 26; 610 NW2d 563 (2000). Unpreserved issues are reviewed for "plain error affecting substantial rights." *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011) (quotation marks and citation omitted). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App at 9.

The DHHS "has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights." *In re Hicks/Brown*, 500 Mich 79, 85; 893 NW2d 637 (2017). In order to comply with this duty, the DHHS "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." *Id*. at 85-86. The DHHS also has "obligations under the [Americans with Disabilities Act] that dovetail with its obligations under the Probate Code." *Id*. at 86. The 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*. (quotations marks and citation omitted; ellipses in original). Absent reasonable modifications, "efforts at reunification cannot be reasonable under

the Probate Code if the [DHHS] has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the [Americans with Disabilities Act]." *Id*. When challenging the services offered, a respondent must establish that he would have fared better if other services had been offered. *In re Fried*, 266 Mich App at 542-543.

In this case, respondent merely states that he was "[c]learly . . . afforded absolutely no reasonable accommodations" without citing any evidence establishing this claim. Respondent simply makes bare assertions that the DHHS failed to provide reasonable accommodations. However, the record reflects that the DHHS provided services to respondent in an effort to reunify him with the child. For example, the DHHS referred respondent for a psychological evaluation, mental health services, the ADA program, parenting classes, and substance abuse programs. The DHHS also provided supervised visits at the beginning of these proceedings. Despite these referrals and services, respondent admitted that he simply did not care and did not take it upon himself to cooperate in these services. "Not only must respondent cooperate and participate in the services, [he] must benefit from them." *In re TK*, 306 Mich App 698, 711; 859 NW2d 208 (2014).

Moreover, the record reflects that respondent attempted to schedule a psychological evaluation to no avail. Respondent called a doctor one time to schedule a psychological evaluation for the same day he made the call; however, the doctor could not fit respondent into his schedule because he was already booked. An appointment was made for a future time, but respondent failed to appear and the doctor could not reach respondent at the provided phone number; thus, respondent failed to obtain the psychological evaluation. This case simply presents a wholesale failure by respondent to cooperate with, and benefit from, the services offered. Had respondent engaged in the initial services, the DHHS could have assisted in making any necessary referrals. In other words, if respondent had obtained the psychological evaluation, DHHS could have determined what, if any, accommodations or additional services were necessary. "While the DH[H]S has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondent[] to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

Respondent claims that the DHHS could have provided him with "special psychiatric and psychological care, even if it meant hospitalizing him so that he could get this care." Respondent also argues that the DHHS left it to him to call and schedule the psychological appointment. However, the record demonstrates that respondent had no issues using a phone because he called the DHHS numerous times to cancel supervised visits with the child as well as set up a drug screen. He also demonstrated that he could contact the doctor to schedule the psychological evaluation but simply failed to follow through after the first phone call. Respondent's attempt to establish that he would have fared better with a psychological evaluation is not an identification of services that would have accommodated his special needs more; it is simply an identification of a service that was provided from the outset. See *In re Fried*, 266 Mich App at 542-543. And respondent has failed to identify what services the DHHS should have provided to accommodate his specific needs. See *id*. Unlike in the case of *In re Hicks/Brown*, 500 Mich at 89, the record here does not establish that there were specifically requested services that the DHHS failed to provide. In

summary, respondent's argument challenging the termination of his parental rights to the minor child is without merit.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Brock A. Swartzle