STATE OF MICHIGAN

COURT OF APPEALS

In re K. NESBITT, Minor.

UNPUBLISHED
February 11, 2021

Nos. 352993; 352994
Hillsdale Circuit Court
Family Division
LC No. 17-000659-NA

Before: CAVANAGH, P.J., and SERVITTO and CAMERON, JJ.

PER CURIAM.

In these consolidated appeals,[1] respondents appeal the trial court's order terminating their parental rights to their child, KN, under MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist), (c)(*ii*) (other conditions continue to exist), (g) failure to provide proper care or custody), and (j) (reasonable likelihood of harm if returned to parent). We conditionally reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

After a series of several events, KN was removed from respondents' care in September 2017. Specifically, in 2016 or early 2017, KN located and ingested prescription medication that belonged to someone who was visiting the family home. Respondents did not take KN to the doctor. Additionally, on multiple occasions in June 2017, KN, who was four years old at the time, was found to have wandered several blocks from the family home unaccompanied. The police were involved several times in searching for KN. In early September 2017, while unsupervised, KN again located and ingested prescription medication that belonged to a family friend. KN was taken by ambulance to a hospital, where she was treated and released.

Petitioner filed a petition for temporary custody, and KN was removed from respondents' care. Following an adjudication trial in October 2017, the trial court found that KN came within its jurisdiction. Respondents were ordered to comply with a parent-agency treatment plan that was

[1] *In re K Nesbitt*, unpublished order of the Court of Appeals, entered March 10, 2020 (Docket Nos. 352993 & 352994).

designed to improve their parenting skills. After respondents made insufficient progress on their treatment plan, petitioner sought termination of their parental rights. The termination hearing was scheduled to commence in August 2019. However, after observing that KN had previously been identified as having Indian heritage, the trial court sua sponte questioned whether notice was ever given under the Indian Child Welfare Act ("ICWA"), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act ("MIFPA"), MCL 712B.1 *et seq*. Finding that it was not, the trial court dismissed the termination petition and ordered petitioner to comply with the statutory-notice provisions. Several months later, the trial court found compliance with ICWA and MIFPA and proceeded with the termination hearing in February 2020. At the conclusion of the hearing, the trial court found that statutory grounds to terminate respondents' parental rights had been established by clear and convincing evidence and found that termination of respondents' parental rights was in KN's best interests. These appeals followed.

II. ANALYSIS

A. ICWA AND MIFPA (BOTH DOCKETS)

Respondents have both raised issues related to ICWA and MIFPA on appeal. "Issues involving the application and interpretation of ICWA are questions of law that are reviewed de novo." *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012). Similarly, this Court "review[s] de novo issues involving the interpretation and application of MIFPA." *In re Detmer/Beaudry*, 321 Mich App 49, 59; 910 NW2d 318 (2017). However, because respondents did not raise their appellate claims in the trial court, their claims are unpreserved, and we apply the plain-error standard set forth in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). *In re Ferranti*, 504 Mich 1, 25, 29; 934 NW2d 610 (2019). In order to avoid forfeiture under the plain error test,

> 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) . . . the plain error affected substantial rights . . . [, and 4)] once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted . . . when the plain, forfeited error . . . seriously affected the fairness, integrity or public reputation of judicial proceedings . . . . [*People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018), quoting *Carines*, 460 Mich at 763-764 (alterations and some ellipses in original).]

"An error has affected [a party's] substantial rights when there is a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Walker*, 504 Mich 267, 276; 934 NW2d 727 (2019) (quotation marks and citation omitted).

Although both respondents raise issues related to the provisions of ICWA and MIFPA, their arguments are notably different. Respondent-mother does not appear to take any issue with petitioner's compliance with the notice provisions of ICWA and MIFPA. Rather, respondent-mother appears to assume that the tribes were properly notified of the action, but argues that the trial court erred by proceeding with the termination hearing because DNA testing and searches in Ancestry.com clearly establish that she is of Cherokee descent. In contrast, respondent-father squarely contests the trial court's determination that the tribes were properly notified under the statutory provisions.

If respondent-mother's arguments were the only ones before us, we would find no merit to them. Indeed, respondent-mother's argument ignores that "it is well established that only the Indian tribe can determine [tribal] membership." *In re Morris*, 491 Mich at 100. Thus, respondent-mother's reliance on data from a website that allows amateur genealogists to trace family history is misplaced, even if this crowd-sourced genealogy site is deemed credible. Respondent-mother also ignores that if proper notice is provided to a tribe, and the tribe fails to timely respond, a trial court is deemed to have complied with its obligations. *Id*. at 103-104, 107. Furthermore, if proper notice is provided and a tribe fails to either respond or intervene in the matter, the burden shifts to the respondent "to prove that ICWA nonetheless applie[s]," i.e., that the child is "an Indian child." *In re Morris*, 300 Mich App 95, 106-107, 832 NW2d 419 (2013).[2]

On appeal, respondent-mother asserts that KN is an "Indian child." In support of this argument, she has provided information from Ancestry.com purporting to establish that her fourth great-grandfather was approved for membership in the Cherokee tribe in 1901. Respondent-mother has also provided the results of DNA testing, which apparently established some Cherokee ancestry. Even if this evidence is credited, respondent-mother has established, at most, some Indian heritage. But DNA testing showing Native American or Cherokee ancestry does not necessarily establish that KN is an Indian child within the meaning of ICWA. Additionally, respondent-mother has provided no evidence that she is a member of an Indian tribe or that she is eligibile for membership in a federally recognized tribe. Thus, respondent-mother's arguments are unpersuasive on several fronts.

Although respondent-father's discussion of this issue is cursory, it is more compelling than respondent-mother's argument. Respondent-father argues that petitioner and the trial court did not make sufficient efforts under ICWA and MIFPA to determine KN's Native American heritage. Respondent-father asserts that without making any review on the record of the "notice" documents that may have existed, the trial court could not determine that KN had no Indian heritage based on the lack of response from the tribes. We agree that the lower court record is insufficient to establish statutory compliance.

Both ICWA and MIFPA were enacted in an effort to "protect[] the best interests of [American] Indian children and promot[e] the stability and security of [American] Indian tribes and families." *In re England*, 314 Mich Ap 245, 251; 887 NW2d 10 (2016) (quotation marks and citation omitted). The notice provisions of ICWA and MIFPA require, in general, that a tribe be notified "when there are sufficient indications that [a] child may be an Indian child[.]" *In re Morris*, 491 Mich at 100. ICWA provides, in pertinent part:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care

[2] An "Indian child" is defined as "any unmarried person who is under age [18] and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" 25 USC 1903(4). An "Indian tribe" is defined as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians[.]" 25 USC 1903(8).

placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding. [25 USC 1912(a).]

MIFPA contains a similar notice provision, which states:

(1) In a child custody proceeding, if the court knows or has reason to know that an Indian child is involved, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending child custody proceeding and of the right to intervene. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice shall be given to the secretary in the same manner described in this subsection. The secretary has 15 days after receipt of notice to provide the requisite notice to the parent or Indian custodian and the tribe.

(2) No foster care placement or termination of parental rights proceeding shall be held until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe or the secretary. The parent or Indian custodian or the tribe shall, upon request, be granted up to 20 additional days to prepare for the proceeding. If the petitioner or court later discovers that the child may be an Indian child, all further proceedings shall be suspended until notice is received by the tribe or the secretary as set forth in this subsection. If the court determines after a hearing that the parent or tribe was prejudiced by lack of notice, the prior decisions made by the court shall be vacated and the case shall proceed from the first hearing. The petitioner has the burden of proving lack of prejudice.

(3) The department shall actively seek to determine whether a child at initial contact is an Indian child. If the department is able to make an initial determination as to which Indian tribe or tribes a child brought to its attention may be a member, the department shall exercise due diligence to contact the Indian tribe or tribes in writing so that the tribe may verify membership or eligibility for membership. If the department is unable to make an initial determination as to which tribe or tribes a child may be a member, the department shall, at a minimum, contact in writing the tribe or tribes located in the county where the child is located and the secretary. [MCL 712B.9.]

Our review of the lower court record does not allow us to confirm that there was compliance with the foregoing provisions of ICWA and MIFPA. Despite representations made on

the record, none of the usual ICWA notice documents are contained in the lower court record provided to this Court. The record does not contain copies of the actual notices that were purportedly sent, and there are no postal return receipts to indicate whether notices were received. Additionally, discussions on the record regarding the notices are less than reassuring.

At the September 12, 2017 preliminary hearing, respondent-mother apparently submitted a form in which she indicated that KN had an "unknown" percentage of Cherokee heritage. This document is in the lower court file and is referenced in the register of actions. In the document, respondent-mother identified a deceased grandmother who apparently had Indian heritage. No reference to this Indian heritage was made on the record at the September 12, 2017 hearing. Similarly, the corresponding order from the hearing does not reference any Indian heritage.

After KN had been in care for nearly two years and respondents had been offered a multitude of services, the termination hearing was scheduled to commence on August 2, 2019. At that time, the trial court sua sponte noted on the record that respondent-mother indicated potential Cherokee Indian Heritage on September 12, 2017. Despite this early disclosure, the trial court indicated that it was unable to find any documentation that the tribes had been notified. The trial court took a brief recess to permit petitioner to attempt to locate the documentation. When the matter resumed, petitioner indicated that its search was unsuccessful. The trial court dismissed the petition and ordered petitioner to either locate the necessary documents or immediately complete paperwork for submission to the Federal Bureau of Indian Affairs.

Between August 2019 and February 2020, the trial court held review hearings, during which the foster care case manager testified regarding the efforts that were being pursued to determine whether KN had any Indian heritage. On August 15, 2019, petitioner reported that the caseworker had been attempting to obtain tribal affiliation information from respondent-mother to complete the necessary forms. The information that respondent-mother had provided was "undecipherable." Nonetheless, the caseworker continued to work with respondent-mother in an effort to collect the information. Indeed, the day before, the caseworker had finally obtained more "useful" information from respondent-mother. The trial court continued the matter to permit petitioner to provide notice.

When the matter resumed on November 14, 2019, petitioner's counsel indicated that the caseworker had sent the notices out "certified" and that she had not received "the cards back." The statement that the notices were sent out "certified" may have been inaccurate, but it is concerning because the statutes require that the notices be sent by registered mail, with return receipt requested. 25 USC 1912(a); MCL 712B.9(1). Apparently, the caseworker had also resent the notices. According to petitioner's counsel, the caseworker sent the notices to the Southern Cherokee Nation of Kentucky, the Tribal Enrollment Office, and the Eastern Bands Tribal Enrollment Office. Petitioner's counsel believed that the notice requirements had been satisfied. Foster care case manager Candi Moyer then explained that she sent "searches" out on August 22, 2019, and when she did not receive a "response," she sent the "searches" out again on October 16, 2019. As of the November 14, 2019 hearing, Moyer had finally received the "cards" back from her first mailing, but not from her second. At the conclusion of the November 2019 hearing, the court indicated that the ICWA-notice issues still had not been resolved to the court's satisfaction. Consequently, the matter was continued.

On January 17, 2020, petitioner refiled the petition to terminate respondents' parental rights. The matter was scheduled for hearing on February 14, 2020. In the interim, a review hearing was held on February 13, 2020. At that time, the trial court queried whether "documentation regarding the whole Indian issue [had been] provided to the court file" because the court did not "recall specifically seeing it[.]" At that time, Moyer indicated that she had turned in "the actual forms with the green cards on them." According to Moyer, the notices were sent on August 22, 2019, and again on October 16, 2019. She further indicated that petitioner had not received any letters in response. When the trial court specifically asked if the "return receipt requested has been returned" and was "in the court file," Moyer replied, "yes." The trial court then noted that "they have 30 days to respond" after the notices were provided. Shortly thereafter, the trial court indicated that, because it was not seeing the cards in the file, it would instruct court staff to continue to look for them. The trial court noted, "obviously we need to have those" cards.

The following day, February 14, 2020, the parties appeared for the scheduled termination hearing. No mention of the "green cards" was made before testimony began. However, at the conclusion of the hearing, the trial court, when issuing its oral ruling from the bench, stated the following:

> I would like to note, before I—I go further with regard to the specific provisions, that the issue of the Indian heritage was brought up immediately prior to the first scheduled termination hearing and that did cause a significant delay. Although, not as much as we have here. I'm not sure what caused that long of a delay, but at any rate, the inquiries were made by Candi Moyer and Samaritas. They have provided to the court the documentation that indicates that they have notified the tribes. They have not heard—well more than 30 days have elapsed since they've provided the notification and the information that they could get from the parents and from court files to determine whether there was Indian heritage or not.
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> The fact that we have not yet heard from them, or that the department or the private agency has not yet heard, specifically, back from the tribes is an indication that there is to be considered, no Indian heritage, according to I.C.W.A. And so, it is appropriate to go forward.

From this record, we cannot confirm that the necessary notice was provided in conformity with the statutes. The record contains no copies of the actual notices purportedly sent, so we are unable to discern the tribes that were allegedly notified. Furthermore, there is no postal return receipt indicating whether notice was received and, if so, by whom. There also is no evidence that the notices were sent by registered mail, return receipt requested, as opposed to certified mail as stated by petitioner's counsel. There is no compelling evidence that the trial court actually had the documents before it to assess compliance with the statutes. We cannot ignore the significance of the absence of documentation. Indeed, in *In re Morris*, our Supreme Court noted the following under circumstances similar to the instant case:

> In [*In re Gordon*, 490 Mich 917; 805 NW2d 444 (2011)], we asked the parties to address "whether the Department of Human Services [("DHS")] and the family court are under a duty to make a complete record of their compliance with the notice requirements of the ICWA . . . ." While the DHS personnel and the

prosecutor made numerous assertions at various hearings that notice had been sent, the record in *Gordon* is devoid of any documentation of the DHS's efforts to notify either the Saginaw Chippewa Indian Tribe or the Secretary of the Interior. There are no copies of the actual notice purportedly sent. Nor does the record include any original or copy of a registered mail return receipt, which is necessary to show not only that notice was received, but also to determine when the 25 USC 1912(a) waiting period begins. Lastly, while [the] caseworker . . . stated to the trial court on January 5, 2009, that she had received and responded to a request for more family-history information, no documentation of that correspondence appears in the record. This is so even though the court repeatedly instructed both the prosecutor and [the caseworker] to ensure that copies of the ICWA-related documents were placed in the court file. It is thus impossible to discern from the record in *Gordon* whether notice was actually sent, to whom it was sent, and whether the notices were received by the appropriate recipients.

While ICWA is silent regarding the recordkeeping requirements of 25 USC 1912(a) notice compliance, we find it essential that certain documents be included in the record. First, our State Court Administrative Office recently adopted the [Bureau of Indian Affairs's] recommendation that "[t]he original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service." BIA Guidelines B.5(d), 44 Fed Reg at 67588. Second, without being able to review the return receipt, the trial court cannot determine whether the proper party actually received the notice sent by registered mail. Third, the trial court cannot determine the date on which the 25 USC 1912(a) waiting period begins to run without knowing the date on which the tribe or the Secretary of the Interior received the notice, as shown by the registered-mail return receipt. Fourth, with no copy of the actual notice in the record, the trial court cannot determine if the contents of the notice provided sufficient, accurate information to enable the tribal authorities to determine tribal status of the child and the child's parents. Finally, appellate courts cannot fulfill their appellate function without documentation in the record sufficient to allow review of a trial court's efforts to comply with 25 USC 1912(a).

Indeed, *Gordon* illustrates the necessity for a documentary record of the attempts to comply with the notice requirements of 25 USC 1912(a). The lack of documentation in the record in *Gordon* prevents us from determining if the contents of the notice were sufficient to apprise the intended recipient of the pending child custody proceeding. We likewise are unable to determine to whom the notices were sent, even though the transcript includes references to both the Saginaw Chippewa Indian Tribe and to "ICWA," the latter of which presumably means the Secretary of the Interior. Further, there is an assertion in the January 5, 2009 hearing transcript that a notice recipient had requested additional family-background information, but we are unable to review either the purported request or any responses made to the request because the record includes neither. Lastly, we cannot determine when or if the notices were actually received by the Saginaw Chippewa Indian Tribe, which would allow us to determine when and if the 25 USC 1912(a) waiting period began to run.

> Therefore, we hold that trial courts have a duty to ensure that the record includes, at minimum, (1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice. In addition, it would be helpful—especially for appellate purposes—for the record to include any additional correspondence between the petitioner, the court, and the Indian tribe or other person or entity entitled to notice under 25 USC 1912(a). [*In re Morris*, 491 Mich at 111-114 (footnotes omitted).]

In *In re Morris*, our Supreme Court held that the proper remedy for ICWA-notice violations is to conditionally reverse the trial court's order and remand for resolution of the notice issues. *Id*. at 122-123. Accordingly, because we conclude later in this opinion that the trial court otherwise properly terminated respondents' parental rights, we conditionally reverse the trial court's order terminating respondents' parental rights and remand for further proceedings. On remand, the trial court shall first ensure that notice is or was properly made to the appropriate entities. See *id*. at 123. If the trial court conclusively determines that ICWA and MIFPA do not apply to the proceedings, either because KN is not an Indian child or because the properly noticed tribes did not respond within the allotted time, the trial court's order terminating respondents' parental rights shall be reinstated. See *id*. If, however, the trial court concludes that ICWA and MIFPA do apply to this child protective proceeding, the trial court's order must be vacated and all proceedings must begin anew in accordance with the procedural and substantive requirements of the statutes. See *id*.

B. RESPONDENT-FATHER'S ARGUMENTS ON APPEAL (DOCKET NO. 352994)

1. JURISDICTION

Respondent-father challenges the trial court's decision to exercise jurisdiction. However, respondent-father did not argue below that the facts were insufficient to warrant the court exercising jurisdiction over KN. Indeed, during his closing argument at the adjudication trial, respondent-father conceded that there was enough evidence for the court to exercise jurisdiction over KN on account of respondent-father's actions. Accordingly, this issue has not been properly preserved for appellate review. Ordinarily, this Court reviews a "trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). However, because this alleged error is unpreserved, we review this issue for plain error affecting respondent-father's substantial rights. *In re Ferranti*, 504 Mich at 25, 29.

"Child protective proceedings are generally divided into two phases: the adjudicative and the dispositional." *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993). The adjudicative phase determines whether the trial court may exercise jurisdiction over the child. *Id*. "In order to find that a child comes within the court's jurisdiction, at least one statutory ground for jurisdiction contained in MCL 712A.2(b) must be proven, either at trial or by plea." *In re SLH*, 277 Mich App 662, 669; 747 NW2d 547 (2008).

In this case, the trial court exercised jurisdiction under MCL 712A.2(b)(1) and (2), which provide that a court has jurisdiction over a child in the following circumstances:

> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship . . . .
>
> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in . . . .

We conclude that sufficient evidence supported a statutory basis for jurisdiction under both MCL 712A.2(b)(1) and (2). During the October 2017 adjudication trial, evidence was presented that respondent-father had been in a relationship with respondent-mother for more than five years and that respondent-mother, the mother of seven children, had a 25-year history with Child Protective Services ("CPS"). The evidence further established that the house in which respondents and KN were living was chaotic. Indeed, at times, there were eight people living in the home, including two of respondent-mother's young adult children. Both respondent-mother and respondent-father testified that respondent-mother typically stayed up all night to do household chores while it was quiet and more peaceful. Respondent-mother would then sleep during the day while respondent-father assumed responsibility for KN.

The evidence further established that, in June 2017, four-year-old KN wandered away from the house on at least three occasions because respondents had failed to properly supervise her. Indeed, during that period, multiple police officers had dealt with reports that KN was wandering unsupervised. In September 2017, an unsupervised KN ingested medication that belonged to a family friend who was visiting the home. Respondent-mother testified that the medication was placed in the visitor's bag "up and away," but KN, who was a known climber, climbed up and got into the bag. From this evidence, the trial court could properly find that respondent-father failed to properly supervise KN and, as a consequence, the child had been denied proper care and custody and was in an unfit home by reason of neglect.

Nonetheless, respondent-father asserts that the proofs at trial were "confusing at best" regarding his role in the events leading to the termination of his parental rights. This assertion is not supported by the record, however. It is undisputed that respondent-father was one of two parents residing in the home and that he was equally responsible for KN's safety and well-being. Furthermore, while respondent-father attempts to suggest that all of KN's unsupervised, rogue activities occurred while he was away from the home and someone else was responsible for KN's safety, this assertion is not supported by the record. Respondent-father admitted that on at least one of the occasions when KN wandered away from the house, he was at home and he did not see KN slip out of the house. Regarding KN's ingestion of pills in September 2017, respondent-father testified that when he arrived home from doing an odd job that day, he then left to go for a walk to get some food. At the time, respondent-father knew that respondent-mother was sleeping on the floor and was not supervising KN. One of respondent-mother's adult children was in the home

with several of his friends. Some of these friends were playing video games in a back room and others were upstairs. Respondent-father claims that he asked the adult child to watch KN and that he heard one of the young women say, "KN come here." Under these questionable circumstances, respondent-father elected to leave the house and, in his absence, KN ingested the medication. From this evidence, the trial court could conclude that respondent-father's actions were not reasonable, that it was unreasonable for him to assume that the others in the house would responsibly watch KN, and that he did not act appropriately in leaving his then four-year-old daughter, essentially, to her own devices.

In sum, a preponderance of the evidence supports the trial court's findings that on multiple occasions respondent-father failed to properly supervise KN, or negligently left her in the care of inappropriate individuals. Accordingly, the trial court did not plainly err when it exercised jurisdiction over KN under MCL 712A.2(b)(1) and (2) with respect to respondent-father.

2. REASONABLE REUNIFICATION EFFORTS

Respondent-father also argues that petitioner did not make reasonable efforts at reunification because it failed to accommodate his known "learning, comprehension and mental health disabilities." We disagree.

"Under Michigan's Probate Code, the [DHS] 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). "As part of these reasonable efforts, the [DHS] 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. This includes updating the parent's treatment plan throughout the case, and giving the parent reasonable time to make changes and benefit from the services before the termination of parental rights. *In re Mason*, 486 Mich 142, 156; 782 NW2d 747 (2010). "If a parent cannot or will not meet [his] irreducible minimum parental responsibilities, the needs of the child must prevail over the needs of the parent." *In re Terry*, 240 Mich App 14, 28; 610 NW2d 563 (2000) (quotation marks and citation omitted).

However, if a parent suffers from a disability under the Americans with Disabilities Act ("ADA"), 42 USC 12101 *et seq*., or suffers from "a known or suspected intellectual, cognitive, or developmental impairment," petitioner has a duty to reasonably accommodate the parent's disability by offering services designed to facilitate the child's return to his or her home. *In re Hicks/Brown*, 315 Mich App 251, 281-282; 890 NW2d 696 (2016), vacated in part on other grounds, 500 Mich 79 (2017). In *In re Hicks/Brown*, 315 Mich App at 282, this Court explained that DHS must

> offer evaluations to determine the nature and extent of the parent's disability and to secure recommendations for tailoring necessary reunification services to the individual. The [DHS] must then endeavor to locate agencies that can provide services geared toward assisting the parent to overcome obstacles to reunification. If no local agency catering to the needs of such individuals exists, the [DHS] must ensure that the available service providers modify or adjust their programs to allow the parent an opportunity to benefit equally to a nondisabled parent.

"[E]fforts at reunification cannot be reasonable . . . if the [DHS] has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the ADA." *In re Hicks/Brown*, 500 Mich at 86. However, "[w]hile the [DHS] has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of [the] respondent[] to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

A review of the record demonstrates that, contrary to respondent-father's assertions, petitioner referred respondent-father to appropriate services and those services were implemented in a way to accommodate respondent-father's impairments. Specifically, in the early stages of the case, the trial court recognized that respondent-father would require services that were tailored to his unique needs. At the October 17, 2017 adjudication, the trial court indicated that it "would like the parenting classes and the services to be as un-cookie-cutter-like, as possible." Later, the trial court emphasized that respondents would "need some very hands-on, concrete, modeling[.]" The trial court continually expressed that respondents needed to receive hands-on assistance. At the January 18, 2018 dispositional review hearing, petitioner's counsel expressed concern regarding respondents' abilities to comprehend the curriculum. The trial court agreed that a cognitive assessment for respondents was warranted.

Dr. Anthony Gensterblum performed a cognitive and psychological assessment of respondents in February and March 2018. Regarding respondent-father, Dr. Gensterblum found that his intellectual capacity fell at a borderline range. Respondent-father had legitimate deficits that affected his ability to learn new information and apply that knowledge to situations in his life. Dr. Gensterblum explained that the underlying reason for the deficits "appear to encompass cognitive, emotional, and mental health issues that together act to impact his problem solving and parenting abilities." However, respondent-father's ability to comprehend written information was higher than expected for an individual in this range. Respondent-father scored "pretty well" on his reading test. He read at a tenth-grade level and his sentence comprehension was at an 8.9 grade level. However, respondent-father made it clear to Dr. Gensterblum that he did not prefer to learn by reading.

Dr. Gensterblum opined that "the range of intellectual functioning does not preclude [respondent-father's] ability to deal with normal parenting situations or in learning new strategies or techniques, but it does suggest certain approaches would be better than others." Dr. Gensterblum further explained: "It is likely though that as required reading becomes longer or more complex [respondent-father] would become somewhat avoidant and would not make the most of his abilities." Therefore, Dr. Gensterblum recommended that "[p]roviding written material in smaller 'chunks' that summarize points in a few sentences or less would increase comprehension and retention of information." Dr. Gensterblum also noted that respondent-father's learning potential would be enhanced through repetition, role play, practical examples, visual examples, and relating specific examples from respondent-father's own life.

The record demonstrates that petitioner provided services that comported with Dr. Gensterblum's recommendations and were responsive to respondent-father's expressed needs. During this case, respondent-father was referred to and participated in a multitude of services including Families First, Keeping Families Together, Nurturing Parenting, Families Together Building Solutions, and individual counseling. Each of these services were administered in a

manner designed to accommodate respondent-father's needs. For example, Families Together Building Solutions was placed in the home in December 2017. The worker would observe the parenting time visits, redirect respondents, and help with any concerning behavior. Through this program, respondents received one-on-one instruction, and they worked on issues such as communication, establishing a schedule, co-parenting, budgeting, and employment.

Respondent-father also explained that he received the assistance of a case manager through the Segue program. He had had this type of assistance even before CPS became involved with the family. Through this program, respondent-father was provided in-home help with housing searches, transportation, and bill paying. Sarah Moreno from Segue worked with respondent-father as his mental health case manager. Her responsibility was to ensure that respondent-father attended all of his psychology appointments, psychiatric appointments, and medication reviews. Respondent-father also met with her if he was having difficulties with anxiety and communication issues.

Respondent-father was also provided the hands-on assistance of a Court Appointed Special Advocate ("CASA"). This individual attended parenting time with respondents and provided concrete parenting direction. As an example, a CASA report noted the following interaction:

> [KN] likes to go for walks but will try and run from her father or get too far ahead of us while walking. On one occasion, I explained to her father how important it was to use those teachable moments to instill safety. I explained how you should be short, but firm with your voice, and that when a moment arises, to tell [KN] why she can't do what she was doing, so that she can stay safe. He implicated the information for the whole walk around the block.

Respondent-father's therapist similarly employed methods consistent with the recommendations. In February 2019, the therapist noted that

> [respondent-father] is able to engage in role-plays and verbalize an understanding of concepts while in session. [Respondent-father] continues to provide day-to-day examples of how he has utilized his skills outside of sessions. He has presented recent situations that he has identified that he did not have the most appropriate responses and explored alternative ways that he could have had a better response.

Samantha Slone, the caseworker from November 2017 until February 2018, observed parenting time and would speak to respondents and make suggestions. Slone would discuss some new technique with respondents, and they would go over various scenarios. Slone would also verify that respondents understood what they were discussing. Slone noted that both respondents appeared to be receptive to the suggestions, but they lacked the ability to follow through. Respondent-father was unable to model the parenting techniques Slone suggested.

Caseworker Scott Warner supervised respondent-father's parenting time for 1-1/2 years and only stopped when parenting time was suspended in May 2019. During visits, Warner repeated prompts and modeling for respondent-father's benefit. Warner also discussed with respondents how to handle KN's tantrums and behavioral issues on many occasions. Moyer began working with the family in May 2018. Moyer regularly met with respondents to discuss their

services. However, respondent-father would not engage with Moyer. Indeed, anytime Moyer tried to have a conversation with respondent-father, he would ignore her. If Moyer spoke to respondents before parenting time, respondent-father would get mad, sit in the corner, and not interact. The visits that followed were typically unruly and turned into a "free-for-all [KN] show."

Respondent-father participated in a class that addressed neglect. Respondent-father testified that he told at least one instructor that he was having difficulty understanding the reading material and that his complaint went unaddressed. However, respondent-father later admitted that the instructor orally reviewed the written material with him. Furthermore, respondent-father did participate in the group discussions and acknowledged that he learned from other people and that experience. Additionally, the trial court, on several occasions, granted respondents additional time to work toward reunification. Although the caseworkers repeatedly reported that respondent-father was not benefiting from services, the trial court did not order petitioner to file a termination petition until May 2019, when the reality of the situation could no longer be ignored. As a consequence of the trial court's indulgence, respondent-father was afforded additional time to work on removing the barriers to reunification.

In sum, contrary to respondent-father's arguments on appeal, petitioner made the necessary referrals to address the barriers to reunification. Furthermore, the services provided to respondent-father were clearly tailored to his needs. The providers often worked with him one-on-one and in his home. Role playing, modeling, and repetition were techniques employed to assist respondent-father in internalizing the information that he was taught. After reviewing the record, we find no merit to any claim that respondent-father's failure to successfully address his parenting issues can be attributed to deficient efforts by petitioner. While respondent-father faults petitioner for failing to accommodate his impairments, the record demonstrates that there was a failure by respondent-father because he was either unable or unwilling to benefit from the services offered.

Indeed, respondent-father's own testimony provides insight into his failure to make any progress toward removing the barriers to reunification. Respondent-father acknowledged that he participated in several parenting programs, but readily admitted that he did not learn anything because he was forced to take the classes and did not want to be there. Respondent-father reiterated several times that he was not going to learn if the classes were forced on him. As this Court has explained before, while petitioner undoubtedly has a responsibility to expend reasonable efforts toward reunification, the respondent has a corresponding responsibility to participate in and benefit from the services provided. *In re Frey*, 297 Mich App at 248. Because respondent-father failed to benefit despite the fact that petitioner sought to address respondent-father's cognitive, mental health, and parenting issues, we are not persuaded that he would have fared better if petitioner had offered other services. See *In re Fried*, 266 Mich App 535, 543; 702 NW2d 192 (2005). We therefore conclude that the trial court did not err by determining that petitioner made reasonable efforts to promote reunification with respect to respondent-father.

C. RESPONDENT-MOTHER'S ARGUMENTS ON APPEAL (DOCKET NO. 352993)

1. STATUTORY GROUNDS

Respondent-mother argues that the trial court clearly erred by finding clear and convincing evidence supporting the statutory grounds cited in support of termination. We disagree.

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). A finding is clearly erroneous if, although there was evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *In re Mason*, 486 Mich at 152. To be clearly erroneous, a decision must be more than maybe wrong or probably wrong. *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). This Court must give regard "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

The trial court terminated respondent-mother's parental rights under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). These statutory provisions permit 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:
>
> (*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.
>
> (*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.
>
> * * *
>
> (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.
>
> * * *
>
> (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.

Between 1993 and 2012, respondent-mother gave birth to seven children. Her history with CPS dates back more than 25 years. In 1994, CPS investigated the family when respondent-mother's 13-month-old son died after falling and striking his head. In the years that followed this initial CPS investigation, later-born children all were removed at various times from respondent-mother's care following allegations of physical and medical neglect. During these early CPS proceedings, respondent-mother participated in services. The services were so numerous that

respondent-mother could not recall which ones she participated in, but she acknowledged that they were all designed to improve her parenting skills.

In September 2017, KN was removed from respondents' care, and the trial court exercised jurisdiction over KN after it found that respondents had failed to properly supervise the four-year-old child, who repeatedly wandered blocks away from the home and on two occasions ingested prescription medications. After adjudication, the trial court ordered respondent-mother to comply with a treatment plan designed to improve her parenting skills and thereby remove the barriers to reunification. Services offered to respondent-mother included parenting classes, parenting time, cognitive and psychological evaluations, housing assistance, and individual counseling.

During the termination hearing, two caseworkers and one case aide provided very similar testimony. In general, respondent-mother was compliant with services, but she was unable to demonstrate that she could use the knowledge and tools she was offered to provide proper care for KN. Despite hands-on services throughout the proceedings, respondent-mother continued to demonstrate poor parenting skills. Visits were chaotic and unorganized, and respondent-mother was not sufficiently in tune with KN's needs. KN continued to run away from respondents. When KN acted out during parenting time, respondent-mother either failed to acknowledge the behavior, became frustrated, or would leave. When KN had tantrums, both respondents seemed confused. Respondents also had difficulty setting boundaries for KN, and they required repeated prompting and modeling. Additionally, there were times when respondent-mother fell asleep during parenting time. On one occasion, she left a visit to take a nap. At the time of termination, the caseworkers did not see any appreciable change in the manner in which respondent-mother engaged with KN despite being offered years of services. Because there was no evidence that KN would be safe in respondent-mother's care, a caseworker recommended termination of respondent-mother's parental rights.

Furthermore, contrary to respondent-mother's arguments on appeal, there was no credible testimony that respondent-mother's parenting ability would improve within a reasonable time considering KN's age. Dr. Gensterblum evaluated respondent-mother over the course of several days in March 2018. Dr. Gensterblum found that respondent-mother's intellectual functioning was relatively good and noted that she fell in the low-range level overall. Other tests revealed that respondent-mother had difficulty retaining information. In stressful situations, even if she had internalized some skillset, respondent-mother would not be able to access the information. As a result, according to Dr. Gensterblum, respondent-mother would be prone to making poor decisions in stressful situations. Dr. Gensterblum agreed that while respondent-mother was capable of learning things, she would have difficulty using what she had learned. He also noted that, during the evaluation, respondent-mother indicated that she already knew what was being taught in services and that she was attending more for other people.

Dr. Gensterblum explained that, psychologically, respondent-mother was quite brittle and ill-suited to seeking support from others. If anything, respondent-mother was more likely to place the blame on other people for existing problems. Respondent-mother also tended to minimize her role in the circumstances. Dr. Gensterblum noted concern that respondent-mother would blame KN for issues, as opposed to addressing her own parenting skills. Dr. Gensterblum believed that this tendency was related to respondent-mother's mental functioning. Moreover, Dr. Gensterblum explained that it would be difficult for a clinician to work with respondent-mother because

respondent-mother's functioning would degrade when she was pressed to face certain issues. Dr. Gensterblum believed that there were methods that could be used to enhance respondent-mother's learning and her retention. However, Dr. Gensterblum believed that these methods would cause more tension and trauma and would increase respondent-mother's depression and anxiety. Although this dichotomy would not make it impossible for respondent-mother to address both her cognitive and psychological issues, it just made it "very, very difficult." Indeed, Dr. Gensterblum opined that, if even possible, it would take respondent-mother "years" to address her issues.

Despite the foregoing, respondent-mother points to the fact that at the time of termination, she had found suitable housing and employment, which she had maintained with respondent-father for the past year. Although the trial court found this accomplishment admirable, it was not particularly compelling. As the trial court noted, while respondent-mother could generally attend to her own most basic needs, there was no evidence that she had removed the primary barriers to reunification, which were her poor parenting skills and her inability to keep KN safe.

In sum, there was clear and convincing evidence from which the trial court could conclude that respondent-mother would be unable to remove the barriers to reunification anytime soon. Seven-year-old KN had been in care for 2-1/2 years. Respondent-mother was in no better position to parent KN than when KN was removed from her care. Moreover, respondent-mother was given an extraordinary amount of time to work toward reunification. Indeed, respondent-mother had been provided with services for the better part of 20 years. During this period, respondent-mother demonstrated a pattern of neglect and poor parenting skills. It is clear that respondent-mother either lacked the ability or the motivation to improve her parenting skills and work toward reunification. We conclude that the trial court's finding that termination of respondent-mother's parental rights was proper under MCL 712A.19b(3)(c)(*i*) was not clearly erroneous.[3]

2. BEST INTERESTS

Respondent-mother argues that the trial court clearly erred by finding that termination was in KN's best interests. We disagree.

"The trial court must order the parent's rights terminated if the [DHS] has established a statutory ground for termination by clear and convincing evidence and it finds from a preponderance of the evidence on the whole record that termination is in the children's best interests." *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). We review the trial court's best-interest determination for clear error. *Id.*

This Court focuses on *the child*—not the parents—when reviewing best interests. *In re Schadler*, 315 Mich App 406, 411; 890 NW2d 676 (2016). "In making its best-interest determination, the trial court may consider the whole record, including evidence introduced by any

[3] Because we have concluded that at least one ground for termination existed, we need not consider the additional grounds upon which the trial court based its decision. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009). Nonetheless, we have considered them and conclude that termination was also appropriate under MCL 712A.19b(3)(g) and (j).

party." *In re Medina*, 317 Mich App 219, 237; 894 NW2d 653 (2016) (quotation marks and citation omitted).

> [T]he court should consider a wide variety of factors that may include 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. The trial court may also consider . . . the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [*In re White*, 303 Mich App at 713-714 (quotation marks and citations omitted).]

The court may also consider psychological evaluations and the child's age. *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009).

The trial court did not clearly err when it found that termination of respondent-mother's parental rights was in KN's best interests. A preponderance of the evidence established that respondent-mother did not possess the skills necessary to keep KN safe or to provide for her special needs. KN had been diagnosed with several conditions that would challenge even a parent with exemplary parenting skills. After a trauma assessment, KN was referred for additional counseling and therapies. Further assessment ruled out autism. However, at the time of the termination hearing, KN's cognitive delays continued to be assessed. KN also had speech deficits and memory retention issues. There was no evidence that respondent-mother was equipped to meet KN's special needs.

Furthermore, it was clear that any bond between respondent-mother and KN was minimal. The caseworker explained that KN knew respondents and referred to them as "mom" and "dad." During parenting time, however, KN would become bored, and she did not look to respondents for her "needs and wants." When KN needed comforting, she would not turn to either respondent; instead, KN would either turn to a caseworker or her foster parents. Additionally, any bond that existed was not healthy for KN. The relationship between respondents and KN had taken its toll on KN's emotional, physical, and behavioral well-being. The caseworker described the behaviors by KN that precipitated the suspension of respondents' parenting time in May 2019. According to the caseworker, KN nearly always wet the bed the night after a visit. She would also urinate in her pants the next day. At school, KN's behavior deteriorated after parenting time. These behaviors, which correlated closely with parenting time, did not occur at other times and were unusual for KN.

In May 2019, KN underwent a trauma assessment. During this assessment, the clinicians, among other things, observed and evaluated respondents' interaction with KN. The clinicians concluded that KN exhibited symptoms of trauma, that her symptoms were greatly exacerbated by visits with respondents, and her attachment to her parents was "ambivalent." The clinicians diagnosed KN as suffering from post-traumatic stress disorder with dissociative symptoms, attention deficit hyperactivity disorder, enuresis, and disinhibited social engagement. The results of this evaluation yielded a lengthy report with a multitude of recommendations intended to address KN's extensive emotional, physical, social, educational, and behavioral needs. At the time of termination, the foster parents and therapists continued to work with KN on appropriate and inappropriate touching.

It was clear that termination of respondents' parental rights was the only avenue by which KN would achieve the stability and permanence that she required. According to the caseworker, KN was doing well in the nonrelative foster home. After the trial court suspended parenting time, KN's behavior improved within a few weeks. In the caseworker's opinion, KN's well-being had improved while in foster care, and she had blossomed. KN's communication and socialization skills had improved because of the hands-on parenting of the foster parents. Because KN required stability, permanency, and consistency, the caseworker opined that termination of respondents' parental rights was in KN's best interests. Moyer believed that if respondents' rights were terminated, adoption was likely. Importantly, if the current foster parents did not adopt, a secondary caregiver had expressed an interest in adopting KN. In light of the length and history of the case, the trial court did not clearly err by determining that termination of respondent-mother's parental rights was in KN's best interests. See *In re White*, 303 Mich App at 713-714.

III. CONCLUSION

We affirm the trial court's order with respect to the substantive issues raised by respondents on appeal. However, for the reasons explained above, we must conditionally reverse the trial court's termination order and remand for the limited purpose of ICWA and MIFPA notice compliance. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Thomas C. Cameron