

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
October 21, 2010

In the Matter of THAYER, Minors.

No. 297757
Gratiot Circuit Court
Family Division
LC No. 08-007382-NA

In the Matter of THAYER, Minors.

No. 297872
Gratiot Circuit Court
Family Division
LC No. 08-007382-NA

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal from the trial court's order that terminated their parental rights to the two minor children under MCL 712A.19b(3)(a)(ii), (c)(i), (c)(ii), (g), (j), and (n). For the reasons set forth below, we affirm.¹

I. Facts and Proceedings

Respondents are the biological parents of two sons, the minor children in this case. Respondent mother had two daughters from previous relationships and, in November 2008, the girls were removed from the home because respondent father had sexually abused the girls and their friends. Respondent mother knew since 2004 that respondent father had been convicted of

¹ In order to terminate parental rights, a trial court must find that a statutory ground for termination was established by clear and convincing evidence and that termination is in the children's best interests. MCL 712A.19b(5). This Court reviews these findings for clear error. MCR 3.977(K); *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). A finding is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Regard is given to the special ability of the trial court to judge the credibility of the witnesses who appear before it. MCR 2.613(C); *Fried*, 266 Mich App at 541.

criminal sexual conduct (“CSC”) in 1991, but she failed to protect her daughters. The boys who are the subject of this appeal were both five years old when the girls were removed from the home.

Respondent father was arrested and jailed for the sexual abuse. He pleaded guilty to assault with intent to commit second-degree CSC, and the court sentenced him to three to 15 years in prison as an habitual offender. The two boys were removed from the home in June 2009, at ages six and five, after they set fire to a mattress while respondent mother was in the house. At the termination hearing the following March, an expert psychological witness testified that the boys suffer from severe pathology. In addition to setting fires, they urinated on walls and objects, initiated aggressive sexual contact with their peers, and one had tortured and killed animals for pleasure. The same expert witness had diagnosed respondent mother with major depression, polysubstance abuse disorder, and opined that she had characteristics of dependent personality disorder and narcissism.

II. Respondent Mother’s Claims on Appeal

Respondent mother argues that the trial court erred by failing to make a finding that termination of her parental rights was in the minor children’s best interests. MCL 712A.19b(1) requires a trial court to “state on the record or in writing its findings of fact and conclusions of law with respect to whether or not parental rights should be terminated.” MCL 712A.19b(5) requires a trial court to find both that there is a statutory ground for termination, and that termination is in the children’s best interests.

The trial court issued an opinion and order terminating respondents’ parental rights. In its order, the court ruled, without explanation, that termination of both respondents’ parental rights was in the children’s best interests. However, in its six-page opinion, the court stated its findings of fact in detail and concluded:

There was no credible evidence submitted by anyone that termination of parental rights was not in the children’s best interests. *As a matter of fact, the Court determines that Ms. Thayer’s functioning is impaired. Multiple services were provided to improve her parenting skills and to deal with her substance abuse problems to no avail.* (Emphasis added.)

Although the court could have stated its finding with more precision, the trial court’s meaning is clear, especially when read in conjunction with the remainder of the opinion and the accompanying order. We hold that the trial court correctly ruled that termination of respondent mother’s parental rights was in the children’s best interests.

Respondent mother claims that she was denied the effective assistance of counsel. Because she did not raise this issue below or by moving for rehearing, we review this issue for plain error, based on the existing record. *Bay County Prosecutor v Nugent*, 276 Mich App 183, 193; 740 NW2d 678 (2007); *People v Thew*, 201 Mich App 78, 89; 506 NW2d 547 (1993).

To establish that counsel was ineffective, respondent mother must show that counsel’s performance fell below an objective standard of reasonableness, and that the deficiency was so prejudicial that it denied the respondent a fair trial. *In re CR*, 250 Mich App 185, 198; 646

NW2d 506 (2002). In order to do so, respondent mother must prove “that there is ‘a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.’” *Id.*, quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).² The respondent must also overcome a presumption that the actions about which she complains were sound trial strategy. *Thew*, 201 Mich App at 89.

We hold that respondent mother has not proved that her trial counsel made unprofessional errors, or that, absent trial counsel's conduct, the court would not have terminated her parental rights. According to respondent mother, counsel advised her to plead no contest to the allegations in the termination petitions. However, she makes no argument and offers no evidence to support her conclusory statements that her pleas were not knowing and voluntary. Regardless of counsel's alleged recommendation, no evidence suggests that respondent mother failed to make an informed and voluntary choice. Moreover, there are a number of strategic reasons for pleading to allegations and respondent mother fails to overcome the presumption that counsel's purported advice was sound trial strategy. Respondent mother also fails to explain how the outcome would have been different had she not pleaded no contest to the allegations.

Respondent mother complains that her trial attorney was ineffective for failing to raise an ADA claim. However, she has failed to establish the requisite factual predicate for her claim by showing she has a cognizable ADA claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Further, nothing in the record shows that respondent mother was denied services that were available to other parents. See *In re Terry*, 240 Mich App 14, 22; 610 NW2d 563 (2000). To the contrary, the record shows that, for many months, petitioner provided her with extensive, appropriate services, including individual and family counseling, substance abuse assessment, and drug screening. Unfortunately, the psychological expert testified that further services would not improve respondent mother's poor prognosis. It is well settled that attorneys are not required to make motions that have no legal merit. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). Counsel's failure to file a motion for accommodations under the ADA did not fall below an objective standard of reasonableness.

Respondent mother contends that her trial lawyer was ineffective for failing to object to hearsay evidence about her criminal record and prior incarcerations because she did not plead to those facts. Though respondent mother is correct that her repeated incarcerations were not included in the allegations to which she admitted, such information, as a matter of course, would generally be included in the multiple, updated service plans. However, even if this information were not otherwise established by admissible evidence, this one failure to object would not push counsel's performance below an objective standard of reasonableness. In light of all of the other evidence the court considered in rendering its decision, as documented in its six-page opinion, any deficiency related to this particular objection is not so prejudicial that it denied respondent a fair trial. *CR*, 250 Mich App at 198. Moreover, respondent mother fails to explain how this prejudiced her case and does not establish that the result would have been different but for her attorney's failure to make this hearsay objection. See *Johnson*, 451 Mich at 124.

² Principles of effective assistance of counsel developed in the criminal context apply by analogy in child protective proceedings. *CR*, 250 Mich App at 197-198.

We also reject respondent mother's assertion that her attorney did not aggressively defend her. Our review of the record establishes that counsel's cross-examination of all of petitioner's witnesses was thorough and effective. Regarding counsel's choice of witnesses, respondent mother has failed to overcome the presumption that these choices were a matter of trial strategy. Respondent mother fails to explain how counsel could have found a more effective witness to testify that she was a good parent when no one had seen her with her children since they had been placed in foster care. She also fails to explain what testimony she would have put on the record had she testified, and why it would have made a difference. Respondent lists no additional witnesses that could have helped her case and fails to explain how her attorney could have provided evidence that termination was not in the children's best interests.

For the above reasons, respondent mother has not established that counsel's performance fell below an objective standard of reasonableness. *CR*, 250 Mich App at 198. Therefore, we find that respondent mother was not denied the effective assistance of counsel.

III. Respondent-Father's Claims on Appeal

We agree with respondent father that the trial court clearly erred in holding that petitioner presented clear and convincing evidence that statutory grounds for termination had been established for respondent father under MCL 750.19b(3)(a)(i) (desertion for 91 days without seeking custody), and (c)(i) and (c)(ii) (conditions leading to adjudication or other jurisdictional conditions exist). This Court has defined desertion is "an intentional or willful act." *In re B and J*, 279 Mich App 12, 18 n3; 756 NW2d 234 (2008), citing *Moore v Prestige Painting*, 277 Mich App 437, 448-449; 745 NW2d 816 (2007). "[T]he dictionary definitions of the words 'desert' and 'desertion' connote an intent to abandon, as well as a sense of finality." *Moore*, 277 Mich App at 449. Petitioner presented no evidence that respondent father intended to abandon the minor children. Further, the conditions that led to adjudication concerning respondent father, his sexual touching of his stepdaughters, no longer existed because they were in guardianships and he was in jail. Petitioner could not prove this statutory ground by clear and convincing evidence because this statutory section simply does not apply to respondent father. Accordingly, the trial court clearly erred in holding otherwise.

However, a trial court may terminate parental rights if it finds that at least one statutory ground for termination has been proven by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). Because termination was proper under §§ 19b(3)(g), (j), and (n)(i), any error in relying on §§ 19b(3)(a) and (c) as additional grounds for termination was harmless. *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000). The trial court did not clearly err in holding that petitioner established a statutory basis for termination of respondent father's parental rights by clear and convincing evidence pursuant to MCL 712A.19b(3)(g), (j), and (n) or that termination of his parental rights was in the minor children's best interests.

Respondent father argues that the petitions do not allege that he neglected or abused the minor children, and that he neither failed to provide proper care and custody nor ever showed any conduct or capacity to harm the minor children. He further argues that petitioner failed to show that he will be unable to provide proper care and custody within a reasonable time considering their ages, because he could be released from prison as early as 2011.

As a preliminary matter, we note that the petition contains statutory allegations of neglect and abuse with regard to all four children. Further, respondent father admitted that he sexually molested his sons' half-sisters. This evidence alone establishes that respondent father failed to provide proper care and custody for the children and that he exhibited the conduct or capacity to harm them, because it is inconceivable that the boys were not emotionally harmed by their father's conduct. There is also no evidence in the record that he has addressed his pedophilia in any way. Therefore, there is no reasonable basis to conclude that he would be able to provide proper care and custody in 2011, even assuming he is, in fact, released at that time and further assuming that this is a "reasonable time." Additionally, there is a reasonable likelihood, based on his past pedophilia, that respondent father would harm the minor children either emotionally by molesting other children or physically by molesting them.

The trial court also did not err in finding MCL 712A.19b(3)(n)(i) established by clear and convincing evidence. Respondent father admits that he was convicted of one of the enumerated crimes, MCL 750.520g, but argues that this statutory ground for termination was not established because the minor children were not a part of this behavior, and they did not observe it. This argument is without merit because the plain and ordinary meaning of the statutory language clearly does not require that the crime involve the minor child. See *In re LE*, 278 Mich App 1, 22; 747 NW2d 883 (2008) (this Court uses plain meaning to ascertain the Legislature's intent). Respondent father argues further that it was not in the minor children's best interests to terminate his parental rights because he continued a strong relationship with the boys while he was incarcerated. Respondent father's representations about the strength of his relationship with the minor children are unsupported by any evidence. Petitioner, on the other hand, provided clear and convincing evidence that the minor children in this case were severely damaged psychologically and engaged in extremely troubling behavior, including aggressive, sexual behavior. The trial court did not clearly err in holding that continuing the relationship with respondent father would be harmful to his sons.

Once a court finds clear and convincing evidence establishing a statutory ground for termination of parental rights, the court must determine whether termination of parental rights is in the best interests of the children. The court must then order termination of parental rights. MCL 712A.19b(5). Determination of the child's best interest can be based on the record as a whole. *In re Trejo*, 462 Mich at 353.

The record provides substantial evidence that it would be in the minor children's best interests for respondent father's parental rights to be terminated. During the time in which the children were in his care, they became severely pathological, and they began to engage in behavior that was highly dangerous to themselves and others, which would only escalate if not addressed immediately. Dr. Lynn Simons testified that the boys exhibited signs of "severe pathology" and needed an emotionally connected parent who could nurture them, help them master issues of self-control, and help them to work through some of their ongoing emotional pathology. Respondent father committed sexual acts against multiple children over a period of years, is incarcerated, and has an earliest possible release date sometime in 2011. There is no indication that he will have conquered his problem, indeed he apparently has not begun to work on it. The children need stability, permanence, and effective parenting now to mitigate the extensive harm they have already suffered. The trial court did not clearly err in holding that termination of respondent father's parental rights was in their best interests.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad