STATE OF MICHIGAN

COURT OF APPEALS

In re M N J VOGT-BARCLAY, Minor.

UNPUBLISHED
January 12, 2016

Nos. 327515; 327655
Ionia Circuit Court
Family Division
LC No. 2013-000315-NA

Before: BOONSTRA, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

In these consolidated appeals, respondent mother and respondent father appeal by right the trial court's May 19, 2015 order terminating their parental rights to the minor child. Respondent mother's parental rights were terminated pursuant to MCL 712A.19b(3)(g) (failure to provide proper care and custody) and (j) (children will be harmed if returned to parent). Respondent father's parental rights were terminated pursuant to MCL 712A.19b(3)(c)(*i*) (failure to rectify conditions of adjudication), (g), and (j). We affirm.

First, in docket no. 327515, respondent father argues that his trial counsel was ineffective. Because respondent raises this issue for the first time on appeal, our review is limited to mistakes apparent on the lower court record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). The principles of ineffective assistance of counsel used in criminal cases are applied in proceedings to terminate parental rights. *In re Osborne (On Remand)*, 239 Mich App 597, 606; 603 NW2d 824 (1999). To prevail on a claim of ineffective assistance of counsel, a respondent must establish that (1) counsel's performance was deficient, meaning that it fell below an objective standard of reasonableness, and (2) but for counsel's error, there is a reasonable probability that the outcome of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). A respondent must overcome a strong presumption that counsel's actions constituted sound trial strategy. *Id.*

Respondent father first claims that trial counsel was ineffective for failing to move to disqualify the trial judge, who had previously presided over father's juvenile delinquency proceedings. MCR 2.003 provides that a judge be disqualified when the judge is biased against a party or cannot act impartially. MCR 2.003(C)(1)(a). However, a trial judge generally may not be disqualified "absent a showing of *actual* bias or prejudice." *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009) (emphasis added). "A trial judge is presumed to be impartial and the party who asserts partiality has a heavy burden of overcoming that presumption." *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009). The mere fact that

the same judge was involved in a prior trial or proceeding against the party asserting partiality does not amount to a showing of bias or prejudice for disqualification. *People v Upshaw*, 172 Mich App 386, 388; 431 NW2d 520 (1988).

Respondent father's argument that the trial judge was biased against him appears to be based on speculation; he fails to show any *actual* bias or prejudice stemming from the judge's exposure to respondent father's delinquency proceedings. Moreover, respondent father provides no basis on which to conclude that trial counsel would have been successful if counsel had moved to disqualify the trial judge, and nothing in the trial court's ultimate findings for termination suggests that the trial court was biased or prejudiced against respondent father. The trial court merely outlined respondent's criminal history and acknowledged his "difficult childhood." Because a trial judge is presumed to be impartial absent a showing otherwise, *MKK*, 286 Mich App at 566, there is no basis for this Court to find that trial counsel's performance fell below an objective standard of reasonableness by failing to move to disqualify the judge. Counsel cannot be faulted for failing to raise a meritless challenge in the trial court. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Respondent father also claims that trial counsel was ineffective for failing to object when the trial court took judicial notice of his juvenile record. MRE 201(b) provides that a trial court may take judicial notice of a "fact . . . not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." A trial court may take judicial notice at any stage in the proceeding, whether requested to do so or not. MRE 201(c) and (e).

Here, the trial court's judicial notice of respondent father's juvenile record was appropriate. "A trial court may take judicial notice of any records of the court where it sits." *People v Sinclair*, 387 Mich 91, 103; 194 NW2d 878 (1972). It is apparent from the record that respondent father's delinquency proceedings were held in the same court and before the same judge who presided over the termination case. Thus, the trial court did not err by taking judicial notice of the delinquency file. Because the trial court's actions were appropriate, trial counsel again cannot be faulted for failing to raise a futile objection. *Ericksen*, 288 Mich App at 201. Therefore, respondent father failed to establish that trial counsel was ineffective.[1]

Next, in docket no. 327655, respondent mother argues that her due process rights were violated on the basis of the agency's failure to comply with required policies and procedures.

[1] Because respondent father does not challenge the statutory grounds supporting termination of his parental rights on appeal, we assume that the trial court's termination decision was not clearly erroneous. *In re Dougherty*, 236 Mich App 240, 248; 599 NW2d 372 (1999). We have nevertheless reviewed the statutory grounds used to terminate respondent father's parental rights and find that at least one was met. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009) ("Having concluded that at least one ground for termination existed, we need not consider the additional grounds upon which the trial court based its decision.").

Respondent mother primarily relies on *In re Rood*, 483 Mich 73, 122; 763 NW2d 587 (2009), which addressed procedural due process as follows:

> [A] parent is entitled to procedural due process if the state seeks to terminate his parental rights. The state must make reasonable efforts to notify him of the proceedings and allow him a meaningful opportunity to participate. We evaluate whether a particular parent was afforded minimal due process on a case-by-case basis. Statutory requirements, court rules, and agency policies provide an important point of departure for this inquiry. [*Id.* at 122.]

Respondent mother specifically argues that she was denied due process by the agency's failure to comply with internal policies, citing the Children's Foster Care Manual (FOM) from the Department of Health and Human Services (DHHS).[2] Respondent mother claims that the agency "purposely" failed to comply with DHHS policies and procedures in three ways: first, that she was never informed of the services to which she was referred; second, that she was never informed of the agency's stance regarding her progress; and third, that she was not allowed to participate in the creation of her parent-agency treatment plan or case service plan.

Each of these arguments is without merit. Respondent mother admitted at the termination hearing that the caseworker visited her residence throughout the proceeding to go over the case service plan with her. Presumably then, respondent mother and the caseworker discussed the services to which mother was being referred. Moreover, respondent mother fails to allege any specific referrals to services of which she was unaware, and the record does not point to any. With respect to respondent mother's second argument that she was not informed of the agency's stance regarding her progress, each of the Updated Service Plans created throughout the proceeding referenced the status of respondent mother's progress. Respondent mother makes no claim that she did not receive these reports. Finally, regarding respondent mother's argument that she was not allowed to participate in the creation of the parent-agency treatment plan or case service plan, the record directly refutes this claim. The caseworker reported in the Initial Service Plan that she and respondent mother met and discussed the "treatment plan and what it would entail." At that meeting, respondent mother "agreed to do anything necessary to get her children back into her care." Accordingly, we find each of respondent mother's claims of a due process violation to be without merit.

To the extent respondent mother also argues that the agency failed to make reasonable efforts toward reunification, we review her claim for plain error affecting substantial rights because she failed to raise this issue before the termination hearing. See *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012); *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011). When a child is removed from her parent's custody, the petitioner must "make reasonable efforts to rectify the conditions that cause the child's removal by adopting a service plan." *In re HRC*, 286 Mich App 444, 462; 781 NW2d 105 (2009). But the respondent also has a commensurate responsibility to participate in the services that are offered. *Frey*, 297 Mich

[2] The current version of the manual is available online at <http://www.mfia.state.mi.us/olmweb/ex/html> (accessed November 4, 2015).

App at 248. Throughout this proceeding, respondent mother was provided ample opportunities to address her barriers to reunification. She was referred to a psychological evaluation, counseling services, housing and employment assistance, parenting classes, and a parenting coach. The agency also facilitated supervised parenting time visits for respondent mother. To the extent that respondent mother argues that additional services should have been provided to address her parenting skills, the caseworker explained at the termination hearing that the specific services for interactive parenting treatment were not available. Accordingly, we find no plain error in the reasonable efforts that were expended to reunify respondent mother and the child; thus, she is not entitled to reversal of the termination order on these grounds.

Next, respondent mother challenges the statutory grounds supporting termination of her parental rights. The trial court must find that at least one statutory ground under MCL 712A.19b(3) has been proved by clear and convincing evidence in order to terminate parental rights. *VanDalen*, 296 Mich App at 139. We review the trial court's decision for clear error. *Id.* A finding is clearly erroneous when, even though there is evidence to support it, we have a definite and firm conviction that a mistake has been made. *HRC*, 286 Mich App at 459.

The trial court did not clearly err in terminating respondent mother's parental rights pursuant to MCL 712A.19b(3)(g) or (j). Despite respondent mother's argument that she complied with the case service plan, compliance alone is not enough, because a respondent parent must benefit from the services provided. *In re TK*, 306 Mich App 698, 710-711; 859 NW2d 108 (2014); *Frey*, 297 Mich App at 248. The evidence established that respondent mother was neither fully compliant with nor demonstrated a benefit from services provided to address her emotional stability. Respondent mother did not consistently participate in counseling throughout the proceeding, and she stopped taking her antidepressant medication against a doctor's recommendation. Moreover, respondent mother failed to demonstrate during her supervised parenting time that she was capable of independently caring for the child. While she expressed her belief at the termination hearing that she knew "everything" she needed to parent the child, the evidence established that there were still safety concerns in allowing respondent mother to care for the child on her own. The caseworker believed that respondent mother needed "at least a few more years of intense assistance" before she could receive unsupervised parenting time. Accordingly, the evidence supported that respondent mother failed to provide proper care and custody to the child and there was no reasonable expectation that she could do so within a reasonable time. MCL 712A.19b(3)(g). Also, given respondent mother's unresolved issues with emotional instability and inadequate parenting skills, there was a reasonable likelihood that the child would be harmed if returned to respondent mother's care. MCL 712A.19b(3)(j). Therefore, termination of respondent mother's parental rights was not clearly erroneous.

Finally, respondent mother challenges the trial court's ruling that termination of her parental rights was in the child's best interests. The trial court must find by a preponderance of the evidence that termination is in a child's best interest. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). We review the trial court's decision for clear error. *HRC*, 286 Mich App at 459. Factors to be considered 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." *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). The trial court may also consider the likelihood of the child returning to its parents' home within the foreseeable future, if ever. *Frey*, 297 Mich App at 248-249.

The trial court did not clearly err in making its best-interests findings. While it is apparent that respondent mother and the child shared a bond, the bond is outweighed by the child's need for permanency and stability. Considering respondent mother's unresolved issues with emotional stability and parenting, we agree there is no indication that she would be able to provide the child permanence and stability in the foreseeable future. The child was in foster care for nearly two years, and, in that time, respondent mother "failed to derive any lasting benefit" from many of the services provided to her. *Olive/Metts*, 297 Mich App at 43. Further, the evidence established that the child was doing well in her foster care position, which also has the possibility of adoption. See *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014). Therefore, the trial court's determination that termination was in the child's best interests was not clearly erroneous.

We affirm.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Jane E. Markey