STATE OF MICHIGAN

COURT OF APPEALS

In re A M-B ERB, Minor.

UNPUBLISHED
April 19, 2016

No. 329192
Van Buren Circuit Court
Family Division
LC No. 13-017620-NA

Before: TALBOT, C.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

Respondent mother appeals as of right the trial court's order terminating her parental rights to the minor child under MCL 712A.19b(3)(g) (failure to provide proper care or custody). Because the trial court did not clearly err by terminating respondent's rights and respondent was not denied the effective assistance of counsel, we affirm.[1]

The minor child in the case, AE, was born in October of 2012. Child protective proceedings originated in March of 2013, following allegations that respondent left AE unattended in an infant swing for three hours. After authorizing the petition, the court temporarily removed AE from respondent's care and, over the course of approximately six months, respondent received numerous services to address barriers to reunification, which included emotional instability, lack of parenting skills, substance abuse, unstable housing, and unemployment. However, at the adjudication in October of 2013, the trial court declined to assume jurisdiction over AE and dismissed the petition, at which time AE was returned to respondent's care.

Child protective proceedings were again initiated in September of 2014, after a police drug raid at the home where respondent lived with AE and others. The raid uncovered active methamphetamine reaction vessels, and AE had been left unattended in a bathtub. Respondent later pleaded guilty to maintaining and operating a meth lab, and she admitted that she was using methamphetamine at the time the house was raided and for several months prior thereto.

As a result, in September of 2014, the Department of Health and Human Services (DHHS) again petitioned for the removal of AE from respondent's care. The trial court

[1] The parental rights of the child's father were also terminated. The father has not appealed.

authorized the petition, removed AE from respondent's care, and later assumed jurisdiction over AE. DHHS identified several barriers to reunification: substance abuse, mental health issues, lack of parenting skills, and lack of resources such as housing and income. DHHS offered respondent various services and referrals to address these barriers, including, for example: Family Drug Treatment Court (FDTC), substance abuse treatment, housing referrals, a mental health assessment, individual and group counseling services, random drug screens, and parenting time with AE. Despite these numerous opportunities, respondent failed to participate in, or benefit from, the services provided. Her participation was sporadic at best. She missed counseling sessions, failed to comply with the FDTC requirements and was unsuccessfully discharged from the program. She missed and failed drug screens, and she was incarcerated at various points for noncompliance with FDTC and other offenses. Indeed, respondent showed a general unwillingness to cooperate throughout the proceedings. She was described as "ambivalent" and "superficial" at counseling, and her caseworker stated that respondent showed "no ability to maintain her behavior and her actions for any extended amount of time, not even a few weeks."

In June of 2015, the DHHS petitioned for termination of respondent's parental rights under MCL 712A.19b(3)(g). At that time, respondent was incarcerated with an earliest release date in May of 2017. However, respondent maintained that she was eligible for release from jail for "boot camp," and her attorney argued that respondent could succeed if provided adequate help for her mental health issues.

Ultimately, after hearing the parties' evidence, the trial court found clear and convincing evidence to terminate respondent's rights under MCL 712A.19b(3)(g). The court explained that respondent had done little to address her problems, she had a history of non-compliance, and she failed to take responsibility for her failures. Given respondent's history, the trial court concluded that respondent could not provide proper care and custody and that she would not be able to do so within a reasonable time. The trial court also concluded that termination was in AE's best interests, given that he was approximately three years old and had spent a total of 17 months out of respondent's care. In these circumstances, the trial court reasoned that AE needed permanency and stability which respondent simply could not provide. Having found statutory grounds for termination and that termination was in AE's best interests, the trial court terminated respondent's parental rights. See MCL 712A.19b(5). Respondent now appeals as of right.

Respondent first contends that the trial court clearly erred in finding that a statutory ground for terminating her parental rights was proved by clear and convincing evidence under MCL 712A.19b(3)(g). According to respondent, the trial court prematurely terminated respondent's rights after less than 12 months of services and the trial court erred by failing to consider the possibility of respondent's boot camp release. Further, respondent maintains that historical conduct is insufficient to prove by clear and convincing evidence that she will not be able to provide care and custody in the future and that the trial court thus impermissibly speculated that respondent would not be able to provide care in the future merely because of her past failings.

"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). The trial court's

determination is reviewed for clear error. *Id.*; MCR 3.977(K). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013) (citation omitted).

The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(g), which provides that termination is warranted where "[t]he parent, without regard to intent, 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." As evident from the statute's plain language, this provision "permits termination where (1) the parent fails to provide proper care or custody for the child and (2) there is no reasonable expectation that the parent will be able to do so within a reasonable time given the child's age." *In re JK*, 468 Mich 202, 213-214; 661 NW2d 216 (2003). The second component "is forward-looking; it asks whether a parent 'will be able to' provide proper care and custody within a reasonable time." *In re Mason*, 486 Mich 142, 161; 782 NW2d 747 (2010). When considering whether a parent will be able to provide care in the future, although not dispositive, a court may consider a parent's history of failing to provide care and custody, including a parent's failure to comply with, and benefit from, a case service plan. See *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014); *In re BZ*, 264 Mich App 286, 297-301; 690 NW2d 505 (2004).

In this case, the trial court did not clearly err by finding that respondent failed to provide proper care and custody. The evidence showed that, during the pendency of this case and at the time of termination, respondent lacked suitable housing, she lacked income to care for AE, she showed a lack of parenting skills, and she had a substance abuse problem which impacted her ability to care for AE. DHHS implemented a case service plan to help respondent address these issues, but the record makes abundantly clear that she failed to sufficiently engage in or benefit from that service plan. In these circumstances, the trial court did not clearly err by concluding that respondent could not provide proper care and custody for AE. See *In re JK*, 468 Mich at 214 ("[F]ailure to comply with the parent-agency agreement is evidence of a parent's failure to provide proper care and custody for the child.").

Likewise, the trial court also did not clearly err by finding that there was no reasonable expectation that respondent would be able to provide proper care or custody within a reasonable time considering the child's age. Contrary to respondent's arguments, a trial court may consider a respondent's past history in determining this fact. See, e.g., *In re Archer*, 277 Mich App 71, 75-76; 744 NW2d 1 (2007). As the trial court correctly noted, respondent's issues, especially with drugs, stretched back far longer than the instant proceedings, and respondent had failed to benefit from multiple services offered to her over the years to address her substance abuse and other issues. Far from benefiting from services, at the time of termination, respondent continued to lack appropriate housing, employment, parenting skills, she was incarcerated, and she had not addressed her substance abuse and mental health issues. Moreover, her failure to benefit was largely attributable to her own unwillingness to engage in services.[2] Indeed, insofar as

[2] In support of her argument that the trial court clearly erred in terminating her parental rights, respondent emphasizes the trial court's disregard for the fact that she would be getting out of

respondent suggests that termination was premature without additional time or services, we note that, when offered services, "there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012). As discussed, the record makes plain that respondent had numerous opportunities, yet she failed to demonstrate sufficient compliance with or benefit from those services aimed at addressing her barriers to reunification. Cf. *id.*; *In re BZ*, 264 Mich App at 297-301. On this record, termination was not premature. Rather, respondent's historical failure to provide proper care and custody, coupled with her wholesale failure to benefit from services, amply demonstrates that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time considering the child's young age. See *In re White*, 303 Mich App at 713; *In re Archer*, 277 Mich App at 75-76. Thus, the trial court did not clearly err by terminating respondent's parental rights under MCL 712A.19b(3)(g).[3]

Next, respondent argues that she was deprived of the effective assistance of trial counsel based on her trial counsel's various shortcomings. Specifically, respondent contends that counsel performed ineffectively by failing to prepare for the termination hearing by requesting a permanency planning hearing, by failing to produce expert testimony regarding respondent's mental illnesses, and by failing to ask the court to consider a guardianship in lieu of termination.

Although child protective proceedings are not criminal in nature, "the Due Process Clause indirectly guarantees effective assistance of counsel in the context of child protective proceedings." *In re HRC*, 286 Mich App 444, 458; 781 NW2d 105 (2009). "Thus, the principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002), overruled on other grounds by *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014) (citations omitted). In this case, respondent failed to preserve her claim of ineffective assistance, meaning that this issue is reviewed for errors apparent on the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and a respondent bears a heavy burden to prove otherwise. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). To prevail on a claim of ineffective assistance of counsel, a respondent must establish both that (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the respondent. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because the respondent bears the burden of demonstrating both deficient performance and prejudice, the respondent also necessarily bears the burden of establishing the factual predicate for his or her claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884

prison early to participate in "boot camp." However, as respondent's caseworker pointed out at the termination hearing, it was far from certain that respondent would actually be released from prison early to participate in "boot camp." Moreover, given respondent's overall failure to engage in or benefit from services, nothing in the record shows that termination was not warranted based on respondent's speculation about boot camp.

[3] Respondent does not challenge the trial court's best interests analysis and, in any event, we see nothing clearly erroneous in the trial court best interests determination. See *In re White*, 303 Mich App at 713.

(2001). "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy[.]" *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Counsel is afforded wide discretion in matters of trial strategy, and "[w]e will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Respondent first argues that her trial counsel was ineffective for failing to insist upon a permanency planning hearing before the termination hearing. Respondent maintains that such a hearing would have allowed counsel to better prepare for the termination hearing. However, a trial court's duty to hold a permanency planning hearing is controlled by statute and the court rules, and we see nothing in these provisions that would have allowed counsel to demand a permanency planning hearing before termination. Specifically, before termination of parental rights, a trial court is required to hold an initial permanency planning hearing "no later than 12 months after the child's removal from the home[.]" MCL 712A.19a(1); MCR 3.976(B)(2). Until then, the trial court is simply required to hold dispositional review hearings at designated intervals. See MCL 712A.19(3); MCR 3.975(C); *In re Rood*, 483 Mich 73, 99; 763 NW2d 587 (2009). Further, the fact that a permanency planning hearing has not been held does not prevent a petitioner from filing a supplemental petition seeking termination of the respondent's parental rights. Instead, petitioner may do so "at any time after the initial dispositional review hearing . . . ." MCR 3.977(H)(1)(a). See also MCL 712A.19b(1). A trial court is required to take action on the supplemental petition if the child is in foster care, and may do so in its discretion if the child is not in foster care. MCL 712A.19b(1); MCR 3.977(H).

In this case, the child was removed from respondent's care in September of 2014, and thus it had been approximately nine months when petitioner filed its supplemental petition seeking termination of respondent's parental rights. Because it had not yet been 12 months since the child's removal, the need for a permanency planning hearing had not yet arisen at the time the supplemental petition was filed. MCL 712A.19a(1); MCR 3.976(B)(2). Further, petitioner had the authority to seek termination at that time because the initial dispositional hearing had already occurred, and the trial court was authorized to take action on the supplemental petition. MCL 712A.19b(1); MCR 3.977(H)(1)(a). Accordingly, any insistence by respondent's trial counsel upon a permanency planning hearing would have been futile, and trial counsel is not ineffective for failing to advance a meritless position or make a futile claim. *In re Archer*, 277 Mich App at 84. Moreover, given the evidence supporting termination, respondent has not shown prejudice because she has not shown that a permanency planning hearing would have altered the outcome of the proceedings. *Pickens*, 446 Mich at 302-303. Consequently, her claim of ineffective assistance based on the failure to seek a permanency planning hearing must fail.

Respondent next argues that her trial counsel was ineffective for failing to "produce any expert testimony on respondent's behalf regarding [her] acknowledged mental health issues, the barriers caused by these mental health issues and the treatment of said issues." However, counsel's decision not to call an expert witness is presumed to be a matter of trial strategy, and respondent has not overcome this presumption. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Respondent merely speculates on appeal that favorable expert testimony could have been produced, but she fails to make an offer of proof from an expert or to even provide any meaningful details regarding this proposed testimony. Absent such evidence,

respondent has not shown that counsel performed deficiently by failing to retain an expert or that retention of an expert would have altered the outcome of the proceedings. Cf. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009); *Ackerman*, 257 Mich App at 455. Consequently, respondent has not established her ineffective assistance of counsel claim.

Respondent finally argues that her trial counsel was ineffective for failing "to ask the court to consider the option of guardianship with family members instead of termination of respondent's parental rights." Contrary to respondent's argument, there is no indication on the record that counsel performed unreasonably by failing to make such a request or that such a request would have altered the proceedings. That is, while a trial court must consider a child's placement with relatives before ordering termination, *In re Gonzales/Martinez*, 310 Mich App 426, 434; 871 NW2d 868 (2015), a trial court is not required to establish a guardianship instead of terminating parental rights if termination is in the child's best interests. See MCL 712A.19a(7)(c); *In re Mason*, 486 Mich at 168-169; *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991). Here, the trial court acknowledged that the child was placed with relatives. However, the trial court still determined, based on other relevant factors, that termination of respondent's parental rights was in the child's best interests. We find no clear error in the trial court's best interests determination, *In re White*, 303 Mich App at 713, and we see no basis to conclude that an express request for a guardianship would have altered the outcome of the proceedings. Thus, respondent has not shown prejudice from her counsel's failure to request a guardianship. *Pickens*, 446 Mich at 302-303. In sum, respondent has not shown that she was denied the effective assistance of counsel.

Affirmed.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra
/s/ Douglas B. Shapiro