STATE OF MICHIGAN

COURT OF APPEALS

In re C. R. LECLAIRE, Minor.

UNPUBLISHED
April 19, 2016

No. 329565
Marquette Circuit Court
Family Division
LC No. 14-009832-NA

Before: JANSEN, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating her parental rights to her son, CRL, pursuant to MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist) and MCL 712A.19b(3)(g) (failure to provide proper care and custody). We affirm.

I. FACTS

Petitioner sought to remove CRL from respondent's home and take jurisdiction over the child after receiving a complaint of "improper supervision neglect and threatened harm abuse by" respondent. Petitioner focused on what it characterized as respondent's physically neglectful home, respondent's parenting ability, and prior termination cases involving respondent. Respondent admitted to the description of her home and admitted that she previously had three children removed from her care. Petitioner described respondent as unpredictable, emotionally unstable, mentally ill, suffering from substance abuse, and having "a low level . . . of cognitive or intellectual functioning." The trial court removed CRL and placed him in petitioner's care. Respondent later pleaded to the statutory grounds necessary for the court to take jurisdiction over CRL.

Respondent is almost completely deaf and uses hearing aids and American Sign Language to communicate. A psychological evaluation revealed that respondent has an "estimated IQ of 83." Accordingly, petitioner provided respondent numerous services to facilitate reunification and meet her needs, which included supervised visitations. The parties agreed to a list of services in mediation, and petitioner added services as the case progressed.

After ongoing issues regarding respondent's failure to implement parenting skills, continued problems with respondent's home, and a decrease in the quality of parenting time, petitioner sought termination of respondent's parental rights. At the termination hearing, petitioner's witnesses agreed that returning CRL to respondent's care was a concern, explaining

that respondent had trouble multitasking, could not sustain quality parenting on a long-term basis, and needed consistent prompting from caseworkers. One caseworker denied that respondent had made adequate progress and believed that respondent needed round the clock support to care for CRL. Another caseworker believed that respondent had an ongoing need for services, but was unsure what additional services could be provided.

When considering CRL's best interests, a caseworker explained that CRL has a bond with respondent, but characterized it as "more of an insecure attachment" because respondent was unable to meet CRL's needs. This caseworker stressed that CRL needed stability, but noted that respondent's environment was chaotic. Another caseworker explained that CRL needed permanence "sooner rather than later," and did not believe that respondent would be able to modify her parenting behavior "any time soon to provide permanency" because respondent made limited progress with regard to her parenting skills. The trial court concluded that reasonable efforts were made to preserve the family and found that no additional services or time would facilitate reunification because all "service providers . . . echoed the same testimony; [respondent] failed to be able to consistently demonstrate the skills she was being taught." The court concluded that statutory grounds existed to terminate respondent's parental rights and that termination was in the child's best interests. Accordingly, the trial court terminated respondent's parental rights.

II. ANALYSIS

A. REASONABLE EFFORTS TO REUNIFY

Respondent argues that petitioner did not make reasonable efforts to accommodate her disabilities as required under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*. We disagree.

A respondent must object to services offered "when the court adopts a service plan." *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000). Similarly, "if a parent believes that [the petitioner] is unreasonably refusing to accommodate a disability, the parent should claim a violation . . . under the ADA, either when a service plan is adopted or soon afterward." *Id*. at 26. And "failure to timely raise the issue constitutes a waiver." *Id*. at 26 n 5. In this case, there is no evidence that respondent objected to the services offered or requested ADA accommodations in the trial court, and respondent has not argued on appeal that she did. Therefore, this issue is unpreserved. Indeed, respondent agreed to services in mediation and signed a parent-agency treatment plan outlining the services to be provided. Any claim of error has been waived. See *id*.

Even assuming that respondent did not waive the issue, we conclude that petitioner made reasonable efforts toward reunification, including accounting for and accommodating respondent's personal circumstances. To the extent that we review the unpreserved issue, our review is for plain error. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

The petitioner generally must make reasonable efforts to reunite the respondent and the child, unless there are aggravating circumstances in the case. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).[1] Specifically, the petitioner must "make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005). But the petitioner's responsibility to provide services is accompanied by a respondent's responsibility to attend and benefit from services. *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012). Namely, "[a]fter . . . children have come within the jurisdiction of the family court, a parent, whether disabled or not, must demonstrate that she can meet [the children's] basic needs before they will be returned to her care." *Terry*, 240 Mich App at 28. And " '[i]f a parent cannot or will not meet her irreducible minimum parental responsibilities, the needs of the child must prevail over the needs of the parent.' " *Id*. (citation omitted). Finally, "[b]efore the trial court enters an order of disposition, it is required to state whether reasonable efforts have been made to prevent the child's removal from the home or to rectify the conditions that caused the child to be removed from the home." *In re Plump*, 294 Mich App 270, 272; 817 NW2d 119 (2011). If a respondent suffers from a disability as defined under the ADA, the petitioner must "make reasonable accommodations for those individuals with disabilities." *Terry*, 240 Mich App at 25-26. If the petitioner "fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family." *Id*. at 26.

In this case, as discussed above, there is no evidence that respondent raised the issue so that petitioner could make reasonable accommodations for her conditions. However, even assuming that respondent timely raised the issue, the record does not support her claim that petitioner failed to reasonably accommodate any limitations or disabilities. CRL was removed from respondent's care because she had poor parenting skills, her home was unsafe, she had difficulty feeding CRL and needed assistance with following through with safe sleep practices, she was emotionally unstable, she abused drugs, and she had a low level of cognitive or intellectual functioning. Petitioner offered respondent a number of services in an attempt to rectify these concerns, including supervised parenting time with hands-on instruction, a psychological evaluation, counseling, infant mental health programming, family support educators, drug and alcohol screens, family team meetings, and help identifying safety concerns in the home. Respondent's case worker asked respondent if petitioner could provide any additional services, but there is no evidence that respondent requested additional services. Respondent fails to identify on appeal what additional services petitioner should have provided. Further, the services accommodated respondent's personal circumstances. Respondent had the use of hearing aids, and she was encouraged to utilize sign language. An American Sign

[1] We note that respondent's parental rights to one of her other children were involuntarily terminated. Therefore, even assuming that petitioner failed to make reasonable efforts, reasonable efforts were not required. See MCL 712A.19a(2)(c); *In re Smith*, 291 Mich App 621, 623; 805 NW2d 234 (2011). However, we review the issue to the extent that the trial court concluded that reasonable efforts to reunify the child and family were required and because we conclude that petitioner made reasonable efforts to reunify the child and respondent. See MCL 712A.19a(2).

Language interpreter was provided as needed at court hearings. Petitioner was aware of and addressed respondent's low level of cognitive functioning. Petitioner provided respondent with individual and group counseling, provided hand's-on assistance with parenting skills, prompted respondent to use newly learned parenting skills, and helped respondent identify and repair problems in the home. But the record is clear that respondent failed to consistently benefit from those services, see *Frey*, 297 Mich App at 248, or to show that she could meet " 'minimum parental responsibilities,' " as was required for reunification, see *Terry*, 240 Mich App at 28. Therefore, petitioner made reasonable accommodations with regard to respondent's limitations and disabilities.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent next argues that she received ineffective assistance of counsel. We disagree.

To preserve an ineffective assistance of counsel claim, a respondent must move for a new trial or an evidentiary hearing in the trial court. See *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). Because respondent made no such motion, the issue is unpreserved, and our review is limited to the facts and mistakes apparent on the record. See *id*. "[W]hether a [respondent] had the effective assistance of counsel 'is a mixed question of fact and constitutional law.' " *Id*. (citation omitted). We review questions of law de novo and the trial court's findings of fact for clear error. *Id*.

A respondent in a termination of parental rights proceeding has the right to the effective assistance of counsel. *In re HRC*, 286 Mich App 444, 458; 781 NW2d 105 (2009). " 'Effective assistance of counsel is presumed, and the [respondent] bears a heavy burden of proving otherwise.' " *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (citation omitted). In order to establish ineffective assistance, the respondent must show "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). There is a strong presumption that counsel's performance constituted sound trial strategy, and a respondent must overcome this presumption. *Id*. at 52.

In this case, none of respondent's five cited instances of alleged ineffective assistance support her contention. First, respondent argues that her counsel erred in calling her as a witness at the termination hearing without adequate preparation. However, no evidence can be found in the record, to which we are bound, that respondent's counsel did not adequately prepare respondent to testify. See *Heft*, 299 Mich App at 80.

Second, respondent argues that her counsel erred in failing to present adequate testimony of her disabilities and needed accommodations. This argument seems to presume the conclusion, i.e., if counsel had done so, then respondent's rights would not have been terminated. However, the record shows that the court was well aware of respondent's circumstances. It can be presumed that counsel knew that respondent had to show that she had made progress, and thus counsel made the decision to focus on the improvements respondent made. This is a strategic decision that we will not second-guess on appeal. See *Trakhtenberg*, 493 Mich at 52.

Third, respondent argues that her counsel erred in failing to call an expert witness to discuss her disabilities and needed accommodations. The decision to call witnesses is presumed to be a matter of trial strategy, not indicative of deficient or objectively unreasonable performance. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). " '[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the [respondent] of a substantial defense.' " *Id*. (citation omitted; first alteration in original). And neither the trial court record nor the briefing reveal what expert could have been called and what testimony would have been provided. Respondent has the burden to establish the factual predicate of her ineffective assistance of counsel argument, which she fails to do. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Fourth, respondent argues that her counsel erred in conducting short cross-examinations that failed to elicit information about the lack of accommodations made for her circumstances. Respondent's counsel cross-examined all four of petitioner's witnesses at the termination hearing, asking them about CRL's behavior, the child's safety, respondent's benefit from services, and improvements to respondent's home. This was consistent with focusing on the improvements respondent made, which, as noted above, was a reasonable strategy. See *Trakhtenberg*, 493 Mich at 52.

Fifth, respondent argues that her counsel erred in recommending that she "proceed to a bench trial." Respondent never had a bench trial as she pleaded to the statutory basis for jurisdiction. Further, respondent was not entitled to a jury at the termination hearing. *In re Sanders*, 495 Mich 394, 406; 852 NW2d 524 (2014); MCR 3.911(A).[2] Thus, respondent's argument is without merit. For the reasons discussed, the actions of respondent's counsel did not constitute ineffective assistance.

Affirmed.

/s/ Kathleen Jansen
/s/ Deborah A. Servitto
/s/ Michael J. Kelly

[2] We note that respondent does not challenge on appeal the trial court's decision with regard to the statutory grounds for termination or the child's best interests. To the extent that respondent implicitly raises a challenge to either issue, we have reviewed both issues and conclude that the trial court did not err in terminating respondent's parental rights.