

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* THURSTON, Minors.

UNPUBLISHED  
July 19, 2016

No. 330835  
Lapeer Circuit Court  
Family Division  
LC No. 14-012067-NA

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Before: WILDER, P.J., and Murphy and O'CONNELL, JJ.

PER CURIAM.

Respondent-mother, C. Thurston, appeals as of right the trial court's order terminating her parental rights to two of her minor children under MCL 712A.19b(3)(c)(i) (failure to rectify the conditions leading to adjudication), (g) (failure to provide proper care and custody), and (j) (likelihood of harm to the children if returned to the parent's home). We affirm.

I. FACTUAL BACKGROUND

According to Children's Protective Services (CPS) investigator Julie Fullerton, Thurston allowed the children's father, who was previously convicted of sexually abusing one of the children, to visit them unsupervised. The children stated that they saw their father every weekend. Thurston was also arrested for using heroin. In October 2014, Thurston pleaded responsible to the allegations.

According to Mary Bukosky, the children's foster care worker, the children were placed with a maternal aunt and uncle. The Department of Health and Human Services (the Department) recommended various services, including substance abuse screening and counseling. Thurston had not provided proof of employment or of housing safe for the children. Throughout the pendency of the case, Thurston consistently tested positive for substances and failed to attend drug screens. Bukosky provided Thurston with a parenting aide, but the parenting aide discontinued her service because Thurston failed to contact her. Foster care worker Angela Matz testified that the Department had received no evidence that Thurston had participated in any other services.

The trial court adjourned a termination hearing in May 2015 after Thurston indicated she would consent to a juvenile guardianship. The trial court informed Thurston that the guardianship was "intended to be a replacement, in effect, for a termination of parental rights" and that Thurston would have no further rights to visit or control the children. Thurston

indicated that she understood and agreed. The trial court authorized the Department to stop services and reunification efforts while planning for the guardianship.

However, the Department filed a supplemental petition to terminate Thurston's parental rights in October 2015. Bukosky indicated that the children had informed her that they wanted to be adopted and have their names changed. According to Bukosky, they were "very adamant about it" and wanted to be part of their new family. Bukosky indicated that other children in the home had been adopted and that adoption would provide the children with more emotional permanence. The trial court changed the children's permanence goals to termination and adoption.

At the December 2015 termination hearing, Fullerton reiterated the circumstances that brought the children into care. CPS investigator Eglantina Ograjan testified that a son recently born to Thurston tested positive for suboxone and had been removed from Thurston's care. Parenting aide Christina Nelson testified that Thurston lacked stable housing, employment, or income. Thurston attended meetings inconsistently with Nelson, who was inconsistent in communication and was late to or canceled some parenting visits. After Thurston failed to show to a parenting visit in February 2015, Nelson was unable to get ahold of Thurston. After a month of attempting to contact Thurston with no response, Nelson closed the case.

Bukosky testified that Thurston never accepted responsibility for her children's situation. Thurston had tested positive on 15 drug screens and missed 47 screens. Her last test in May 2015 had been positive. Thurston insisted on finding her own counselor and attended counseling irregularly. Thurston's latest counselor had informed Bukosky that Thurston had not been honest with him about testing positive for substances. Thurston had not provided housing or employment information, did not comply with her service plan, did not address her substance abuse issues, and did not cooperate with the Department.

Thurston testified that she was living with her father. However, Bukosky testified that she had contacted Thurston's father, who stated that he had not seen Thurston in three weeks. Thurston also testified that she was employed as a sales associate and was attempting to acquire housing. She claimed that the last time she used an illegal drug was December 2014, and she now had a prescription for suboxone. Thurston testified that she stopped seeing the children in February 2015 because she felt defeated. She submitted twelve documentary exhibits, which included letters from her counselors, verification that she had attended some counseling, parenting classes, and pay stubs from her job from April 2015 to May 2015.

The children's counselors testified that the children's issues had improved in foster care. The daughter expressed that she finally felt like she was part of a family and that she wanted to be adopted. The daughter's counselor opined that she needed stability, and adoption was in her best interests. The son's counselor opined that the son had improved at a faster rate when guardianship became a possibility. He also wanted to be adopted and change his name.

The trial court ultimately found that clear and convincing evidence supported terminating Thurston's parental rights and that termination was in the children's best interests.

## II. STANDARDS OF REVIEW

This Court reviews for clear error whether a trial court engaged in reasonable efforts to reunify a child with his or her parent and its factual findings and ultimate determinations on the statutory grounds for termination. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). We also review for clear error the trial court's determination regarding the children's best interests. MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake. *Mason*, 486 Mich at 152.

A parent has the right to the effective assistance of counsel in a child protective proceeding. *In re HRC*, 286 Mich App 444, 458; 781 NW2d 105 (2009). "In analyzing claims of ineffective assistance of counsel at termination hearings, this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal context." *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). We review de novo issues of constitutional law. See *People v Toma*, 462 Mich 281, 310; 613 NW2d 694 (2000).

### III. REASONABLE EFFORTS

Thurston contends that the trial court erred by terminating her parental rights because the Department did not engage in reasonable efforts to reunify her with the children. Specifically, Thurston contends that the trial court erred by failing to order services after May 2015. We disagree.

A parent has a fundamental liberty interest in the care and custody of his or her children under the Fourteenth Amendment of the United States Constitution. *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Accordingly, the trial court must make reasonable efforts to reunify a child with his or her family unless aggravating circumstances are present. MCL 712A.19a(2); *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005). The Department's failure to provide services implicates the sufficiency of the evidence surrounding the termination. See *In re Rood*, 483 Mich 73, 98; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.); *In re Hicks/Brown*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2016); slip op at 10.

However, the trial court need not provide services when reunification is no longer intended. *In re LE*, 278 Mich App 1, 21; 747 NW2d 883 (2008). In this case, while the Department stopped providing services in May 2015, at that point the children's goal was a juvenile guardianship. The trial court explained to Thurston that she would no longer have reunification efforts, and Thurston agreed. Before that point, the Department had provided a variety of services in which Thurston did not participate consistently. We conclude that the trial court did not err by ending services in May 2015 even though Thurston's rights were not terminated until later.

### IV. STATUTORY GROUNDS

Thurston contends that the trial court erred by terminating her parental rights because she rectified the conditions that brought the children into care. We disagree.

The pertinent statutory grounds provide as follows:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

\* \* \*

(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.

\* \* \*

(g) The 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.

\* \* \*

(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.

The Department has the burden to prove the existence of a statutory ground by clear and convincing evidence. MCL 712A.19b(3); *Mason*, 486 Mich at 166. Clear and convincing evidence is "evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995) (quotation marks and citation omitted, alteration in original). Evidence may be clear and convincing even when contradicted. *Id.*

Thurston essentially asks this Court to reweigh the evidence by crediting her testimony that she had employment, housing, and was drug-free. To do so, we would have to ignore contradictory testimony that indicated that Thurston had consistently failed or failed to attend drug screens, lied about her housing, and was employed only at the end of the termination proceedings. Though Thurston's testimony contradicted other evidence, we conclude that the trial court did not clearly err by finding Thurston's testimony incredible. We are not definitely and firmly convinced that its findings regarding the statutory grounds were mistaken.

Thurston also contends that counsel provided ineffective assistance by offering only documentary evidence and no supporting witnesses. To prove that her counsel was not effective, Thurston must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced her. See *Toma*, 462 Mich at 310-311. What evidence to present and decisions regarding whether to call and investigate witnesses, are matters of trial strategy. *People v Horn*,

279 Mich App 31, 39; 755 NW2d 212 (2008). Additionally, without some indication that a witness would have testified favorably, a defendant cannot establish that counsel's failure to call the witness would have affected the outcome of his or her trial. See *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

In this case, Thurston contends that counsel should have called additional witnesses to support her version of events. However, she provides no proof, such as affidavits, to support that any witnesses would have been available to testify favorably toward her. Because there is no proof that failing to call any such witnesses affected the outcome of Thurston's termination, we reject Thurston's claim that she was deprived of the effective assistance of counsel.

## V. BEST INTERESTS

The trial court must order the parent's rights terminated if it finds from a preponderance of evidence that termination is in the children's best interests. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012); *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). The trial court should weigh all the evidence available to determine the children's best interests. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014).

To determine whether termination of a parent's parental rights is in a child's best interests, the 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." *Olive/Metts Minors*, 297 Mich App at 41-42 (citations omitted). The trial court may also consider "a parent's history of domestic violence, 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." *White*, 303 Mich App at 714.

First, Thurston contends that the trial court erred by finding that termination was in the children's best interests without addressing their placement with relatives. The trial court's findings concerning the child's best interests are factually inadequate if the child is placed with a relative but the trial court does not consider that factor when determining the child's best interests. *In re Mays*, 490 Mich 993, 994; 807 NW2d 307 (2012); *Mason*, 486 Mich at 163-164. But in this case, Thurston is simply mistaken. The trial court stated as follows:

. . . *the Court understands that these children are in relative placement*, but given the circumstances being mother's extremely [sic] lack of judgment, her constant lying, her inability to care for the children appropriately, her choosing drugs over the children, and as I stated, the children's fear, the fact that they've moved on, they no longer want to go back to their mother, they're fearful of having to go back with their mother, they don't even want her name anymore . . . they have indicated that they want and I believe they understand . . . fairly well the difference between adoption and guardianship. They want adoption. They want permanence in this family. They want to stand in the same place as the other children in the family; that *the termination is appropriate given the relative placement*. [Emphasis added.]

The trial court explicitly addressed the children's placement with a relative.

Second, Thurston contends that the trial court erred by terminating her parental rights instead of implementing a guardianship. We disagree.

Under MCL 712A.19a(6)(a), the trial court is "not required" to order termination proceedings if the child is being cared for by relatives. MCL 712A.19a(6)(a). However, the trial court is also not required to place a child with relatives in lieu of terminating parental rights. *In re IEM*, 233 Mich App 438, 453; 592 NW2d 751 (1999), overruled on other grounds *In re Morris*, 491 Mich 81, 121; 815 NW2d 62 (2012). "If it is in the best interests of the child, the probate court may properly terminate parental rights instead of placing the child with relatives." *Id.* At the best-interest phase, the child's interest in having "a normal family home is superior to any interest the parent has." *In re Moss*, 301 Mich App at 88-90.

In this case, the children expressed their desire to be adopted. The trial court was not required to implement a juvenile guardianship instead of terminating Thurston's parental rights. That the trial court could have implemented a juvenile guardianship instead was but one factor for the trial court to consider when determining the children's best interests. We conclude that the trial court's decision not to implement a juvenile guardianship was not clearly erroneous.

Third, Thurston contends that the trial court erred by failing to address the children's bond to her and their need for permanency. Again, the record squarely reflects that Thurston is mistaken. The trial court noted the children's lack of bond in the fact that they no longer wanted to share her name. And the trial court also explicitly addressed permanence. Regardless, these factors are not mandatory; they are instead guidelines for the trial court to consider when deciding whether termination is appropriate. The balance of the factors in this case were also in favor of termination. We are not definitely and firmly convinced that the trial court made a mistake when it found that terminating Thurston's parental rights was in the children's best interests.

We affirm.

/s/ Kurtis T. Wilder  
/s/ William B. Murphy  
/s/ Peter D. O'Connell