STATE OF MICHIGAN

COURT OF APPEALS

In re MICHIELSEN, Minor.

UNPUBLISHED
September 15, 2016

Nos. 331856; 331857
St. Joseph Circuit Court
Family Division
LC No. 14-000252-NA

Before: MURRAY, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

In these consolidated appeals, mother and father appeal as of right the trial court order terminating their parental rights to the minor child under MCL 712A.19b(3)(g) (failure to provide proper care and custody) and (j) (reasonable likelihood of harm).[1] As the trial court recognized, this is a difficult case. Evidence was presented both in favor of, and in opposition to, termination. There was no dispute that the parents loved the child. But as an appellate court we must defer to the findings made by the trial court that have support in the record evidence, and when doing so and in light of the issues raised, we must affirm.

First, mother and father argue that they received ineffective assistance of counsel for numerous reasons. Because father and mother failed to file a motion for a new trial or for an evidentiary hearing, this issue is unpreserved. *People v Lane*, 308 Mich App 38, 68; 862 NW2d 446 (2014).[2] The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the trial court, if any, are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). Where no evidentiary hearing was conducted, this Court's review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

[1] The trial court declined to terminate under (c)(*i*) (conditions that led to adjudication continue to exist) and (c)(*ii*) (other conditions exist).

[2] We apply the same standards to ineffective assistance claims in termination proceedings as we do in criminal cases. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988).

The relevant rules for ineffective assistance of counsel in the criminal context also apply to cases involving termination of parental rights:

> The principles applicable to claims of ineffective assistance of counsel in the arena of criminal law also apply by analogy in child protective proceedings; therefore, it must be shown that (1) counsel's performance was deficient, falling below an objective standard of reasonableness, and that (2) the deficient performance prejudiced the respondent. [*In re Martin*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket Nos. 330231; 330232); slip op at 5.]

The first prong of the analysis requires a "showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *People v Cooper*, 309 Mich App 74, 80; 867 NW2d 452 (2015) (quotation marks and citation omitted). With respect to the second prong, in order to establish prejudice, a party must establish that there is "a reasonable probability that the outcome would have been different but for counsel's errors." *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). Moreover, the party asserting a claim of ineffective assistance of counsel "has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

First, father argues that his initial counsel was ineffective for not attending the preliminary hearing. At that hearing, the referee noted that there was a conflict such that counsel was unable to attend the hearing, but the referee nonetheless continued the hearing. However, even assuming that the failure to attend the one hearing due to a conflict was deficient performance, father failed to demonstrate prejudice. Although father argues that he did not understand the petition from reading it and that he was hearing impaired, the referee indicated that when reading the petition to father he would speak up and father was to let him know if he had any trouble hearing what was said. The referee read the petition, and father did not make any indication on the record that he could not hear what was said. Father also summarily argues that "he would have been able to put on a defense to the allegations [in] the petition" if he had counsel at that hearing. However, father does not explain what that defense was or how the testimony at the preliminary hearing could have been negated. Simply put, father failed to meet his burden to establish that there is "a reasonable probability that the outcome" of the preliminary examination "would have been different but for counsel's errors." *Grant*, 470 Mich at 486.

Second, citing *Matter of Youmans*, 156 Mich App 679, 685; 401 NW2d 905 (1986) (stating that it did "not believe that dirty homes . . . are the type of 'neglect' contemplated by the statute as authorizing the termination of parental rights" and holding that the probate court erred in assuming jurisdiction), father argues that his initial counsel failed to object to jurisdiction based on the conditions of the home. However, unlike *Youmans*, this case did not merely involve a dirty home. The conditions of the home were described as deplorable. Moreover, although the deplorable conditions of the home were the only allegation pleaded to, the allegation was that the poor conditions of the home were contrary to the welfare and well-being of the child. Cf. *id*. (explaining that it was not alleged that the dirty home was uninhabitable). The home here had dog feces and standing urine on the floor. Moreover, there was previous

testimony that there was old food that the minor child could get into on the floor. On this record, the preponderance of the evidence supported that the "home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent" was an unfit place for the child to live, MCL 712A.2(b)(2), and "[c]ounsel was not ineffective for failing to make a meritless argument or raise a futile objection," *People v Collins*, 298 Mich App 458, 470; 828 NW2d 392 (2012).

Third, father argues that his initial counsel did not regularly communicate with him. However, the communication between father and his attorney or the lack thereof is not a fact apparent on the record. Father "has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel," *Hoag*, 460 Mich at 6, and he has not done so here.

Father also argues that his initial counsel failed to advocate on his behalf by ignoring his "notes" passed to counsel "during court." Initially, we recognize that counsel has "great discretion in the trying of a case—especially with regard to trial strategy and tactics." *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). Moreover, the contents of these alleged notes are unknown from the record. Accordingly, there is no way for this Court to judge counsel's performance, as father has failed to establish a factual predicate for his claim. *Hoag*, 460 Mich at 6. In addition, father argues that his initial counsel failed to request proper services for his possible hoarding issues. However, the trial court declined to terminate based on the conditions of the home related to father's hoarding issues. Thus, father cannot demonstrate that there is "a reasonable probability that the outcome would have been different but for counsel's errors." *Grant*, 470 Mich at 486.

Finally, mother makes a brief and vague argument that her initial counsel was ineffective. Mother argues that her initial counsel "just sat there to be present for the hearing and denied her the advocacy and communication a reasonable child welfare attorney would provide." However, the record does not support mother's position. Mother's initial counsel cross-examined witnesses, elicited testimony regarding what mother and father had accomplished and other positives in the case, and asked the caseworker about what the parents needed to do. Moreover, the communication between mother and her initial counsel or the lack thereof is not a fact apparent on the record, *Wilson*, 242 Mich App at 352, and mother has failed to establish the factual predicate for her claim, *Hoag*, 460 Mich at 6. In sum, mother has not met her burden in establishing ineffective assistance of counsel. *Grant*, 470 Mich at 486; *Lockett*, 295 Mich App at 187.

Next, mother and father both argue that the Department of Health and Human Services (DHHS) failed to make reasonable efforts to reunify the parents with the minor child. Specifically, father argues that DHHS's efforts were not reasonable because he was not provided mental health counseling regarding hoarding early enough in the case. Mother argues that DHHS's efforts were not reasonable because she was not provided individualized services. Because mother and father did not raise an objection on these grounds below,[3] we review the

[3] Although father argues that this issue was preserved when his counsel argued at the termination hearing that the parents did not receive adequate assistance from DHHS, this argument was

unpreserved issue for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011) (quotation marks and citation omitted).

Generally, "when a child is removed from the parents' custody, the petitioner is required to 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). "The adequacy of the petitioner's efforts to provide services may bear on whether there is sufficient evidence to terminate a parent's rights." *In re Rood*, 483 Mich 73, 89; 763 NW2d 587 (2009). A trial "court is not required to terminate parental rights if the State has not provided to the family of the child . . . such services as the State deems necessary for the safe return of the child to the child's home." *Id.* at 105 (quotations marks and citation omitted). "While the DHS has a responsibility to expend reasonable efforts to provide services to secure reunification, 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). "Not only must respondent cooperate and participate in the services, she must benefit from them." *In re TK*, 306 Mich App at 711.

Here, father's sole argument relating to the inadequacy of services involves his hoarding issue. In the early stages of this case, father was provided assistance with cleaning and removing items from the home. Eventually, the parents were evicted and moved into an apartment. However, there was testimony that things started to become cluttered and piled up in the apartment. Eventually, the minor child's lawyer-guardian ad litem suggested that hoarding was a mental health issue and that father receive counseling on the matter, which he eventually began. When asked about counseling for father's hoarding issue, the caseworker testified that she "kind of hit a wall with what" she was able to do because she was met with excuses from father and statements such as "I don't need help," or "I don't want help." Moreover, there was testimony that father was resistant and did not cooperate at times. Thus, father's resistance and failure to accept help or acknowledge the issue — rather than DHHS's efforts — led to a delay in services. Further, although father argues that the failure to provide adequate mental health services to address his hoarding issue affected the sufficiency of statutory grounds (g) and (j), the trial court terminated father's parental rights based on his lack of parenting skills rather than his hoarding issue. On this record, father has not established plain error affecting his substantial rights with respect to the reasonableness of the reunification efforts. *In re VanDalen*, 293 Mich App at 135.

Mother argues that her needs and services "took a backseat" to father's needs and services. Although, as mother argues, father was responsible for the cotton ball, BB, and roach tablet incidents, the trial court relied on both parents' failure to benefit from services and lack of parenting skills. Indeed, the trial court noted that neither parent was able to say what they had learned from the services because they failed to benefit. Despite the fact that the Infant Mental Health Specialist testified that she did not have enough information on mother's ability to parent

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raised in closing arguments, which was too late to preserve the issue. See *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000).

the minor child individually, there was other evidence that mother received parenting services and failed to benefit from those services. Mother attended group counseling for parenting, attended six of eight sessions, and incorrectly answered half of the questions in her final evaluation. Further, mother and father participated in individual counseling, which focused on parenting domestic relations. Mother and father then participated in additional counseling, and it was reported that neither parent could repeat anything that they learned from visits with the mental health worker and that neither parent grew in their ability to parent. Even the Infant Mental Health Specialist testified that she did not see any improvement in either mother's or father's parenting skills. The record demonstrates that mother had multiple services and opportunities to work on and address her parenting skills. However, as the trial court found, she did not benefit from those services, and a parent has an equal responsibility to participate in and benefit from the services. *In re Frey*, 297 Mich App at 248; *In re TK*, 306 Mich App at 711.

Although mother's brief on appeal does not explicitly argue that she should have received domestic violence counseling, her argument briefly mentions domestic violence. Mother reported to the caseworker "that one time about 2 years ago [father] was aggressive towards her . . ." However, the caseworker never witnessed any domestic violence between mother and father, and testified that mother let father control the visits but not "like a domestic violence type of control." Although there were issues relating to whether mother and father would stay together, the record does not indicate that domestic violence was raised as a present issue between mother and father. And with respect to their relationship, mother and father received domestic relationship counseling as a service. DHHS must provide reasonable services but does not have a duty to provide every possible service. On this record, even though mother participated in joint services with father, she has not established plain error affecting her substantial rights with respect to the reasonableness of the reunification efforts. *In re VanDalen*, 293 Mich App at 135.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Jane M. Beckering