

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
January 13, 2011

In the Matter of SCHULTZ, Minors.

No. 297887
Wayne Circuit Court
Family Division
LC No. 09-488669

Before: K. F. KELLY, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i), (g), (j), and (k)(ii). We affirm.

I. TERMINATION OF PARENTAL RIGHTS

Respondent's first issue on appeal is that the trial court clearly erred in terminating his parental rights for both his children. We disagree. In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been established by clear and convincing evidence. MCR 3.977(E)(3); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). We review that finding under the clearly erroneous standard. MCR 3.977(K); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

The trial court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence. The trial court terminated respondent's parental rights to his children pursuant to MCL 712A.19b(3)(b)(i), (g), (j), and (k)(ii), which provide:

(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:

* * *

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(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.

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

Whether respondent sexually abused his older son was a factual finding integral to all four statutory grounds relied upon by the court. In this case, respondent's son testified in great detail regarding the nature of the abuse suffered at the hands of his father. He was able to describe the very first event with significant detail and place it along a believable timeline. Respondent's son specifically described two occasions where respondent forced him to engage in anal sex. In addition, respondent's wife provided corroborating evidence when she testified that respondent admitted to her that he had fondled their son and engaged in oral sex with the teenager. There was also testimony that respondent failed to acknowledge his abuse and there was no evidence that respondent engaged in any treatment. In fact, respondent characterized his son as a liar and manipulator. Based upon the foregoing, there was clear and convincing evidence to support termination of respondent's parental rights pursuant to MCL 712A.19b(3)(b)(i), (g), (j), and (k)(ii).

Similar to his hearing strategy, on appeal respondent attacks his son's credibility. Respondent argues that his son's testimony was inconsistent and contradictory and that the teenager fabricated the allegations of abuse in an attempt to harm his parents. However, we conclude, as did the trial court, that respondent's son was a credible witness. Respondent's son relayed his account of the events several times. When it came to the details of the abuse, the teenager was extremely consistent. While there may have been minor discrepancies in his account of the events, these were easily explained by the nature of the trauma, the age of the victim, and the length of time during which the abuse occurred. In addition, respondent's son never recanted his allegations.

With respect to respondent's theory that his son lied about the abuse to harm his parents, the evidence would actually contradict this assertion. Until he was pressed by a friend, respondent's son never revealed the abuse. When he did ultimately confide in this friend, he asked that the friend not tell anyone. In fact, respondent's son was not the individual that ultimately reported the abuse to authorities. The teenager's actions were not those of an individual bent on destroying his parents. There is no doubt that this case was a credibility contest between the alleged perpetrator and his victim. Ultimately, regard must be given "to the trial court's special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich at 337.

Respondent also argues that the trial court erred when it concluded that termination of respondent's parental rights was in the children's best interests. We disagree. As discussed above, before terminating parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b(3) has been met by clear and convincing evidence. MCR 3.977(E)(3). Additionally, the trial court must make an affirmative finding that termination of parental rights is in the child's best interests. MCR 3.977(E)(4). If a statutory ground for termination is established and termination of parental rights is in the child's best interests, the court must terminate parental rights. MCL 712A.19b(5).

There was evidence from which the trial court concluded that neither respondent nor his oldest son was interested in maintaining the parent-child relationship. Indeed, respondent called his son a liar and a manipulator and claimed to be in fear of the teenager. With respect to the younger son, however, respondent professed his desire to maintain his parental rights to this child. However, considering respondent's abuse of his older son, and testimony that respondent had also attempted to touch the younger son inappropriately, there was clear and convincing evidence for the court to conclude that termination of parental rights to both children was in the children's best interest as the only way to insure their safety.

II. ADJOURNMENT

Next, respondent argues that the trial court erred when it denied respondent's motion to adjourn the trial because of his counsel's personal issues. Whether to grant a request to adjourn a termination hearing is within the court's discretion. *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993.) A trial court abuses its discretion when its decision falls outside a range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). Adjournments in child protective proceedings are granted only for good cause after taking into consideration the best interests of the child. MCR 3.923(G)(1) and (2).

In the present case, respondent's counsel failed to establish good cause. While the court did not doubt counsel's family medical issues, it was clear that it believed that counsel was attempting to manipulate the trial date because of the adjournment of respondent's criminal matter. Moreover, it was in the best interest of the children to commence the hearing immediately as there had been one previous adjournment. A second adjournment, due to scheduling restraints, would cause the matter to be delayed until March of 2010.

In any event, respondent has not established that he was prejudiced by the court's denial of the motion to adjourn. MCR 2.613(A); *In re Utrera*, 281 Mich App 1, 14; 761 NW2d 253

(2008). After the direct examination of the first witness, respondent's son, the court essentially reversed its decision and adjourned the matter for nearly a month to give respondent's counsel an opportunity to prepare to cross-examine the teenager. In light of these circumstances, we are not persuaded that the trial court abused its discretion.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, respondent argues that he was denied the effective assistance of counsel. We disagree. "[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." MCL 712A.17c(7); *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002). In order to preserve a claim of ineffective assistance of counsel, respondent was required to file a motion for new trial or request a hearing in the trial court, as required by *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973). Because respondent did not file a motion for new trial or request a *Ginther* hearing, his claims of ineffective assistance of counsel have not been preserved for appellate review. As a result, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

In reviewing a claim of ineffective assistance of counsel in a termination of parental rights case, we must determine (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Effective assistance of counsel is presumed, and a respondent bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Further, the Court will not substitute its judgment for that of trial counsel on matters of trial strategy, including the questioning of witnesses. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Respondent first claims that his trial counsel's representation was deficient because counsel failed to request a separate best interest hearing. Respondent has suggested that certain issues could have been addressed during a best interest hearing, like the needs of the children and the possibility of terminating parental rights to one child only. However, respondent was not denied the opportunity to present best interest evidence. Respondent testified that he loved his children and that he did not want his parental rights terminated. He explained that he wanted his younger son to be moved away from the influences of his older brother. Respondent further testified about the manner in which it might be possible to terminate his parental rights to the older son but maintain them for the younger one. Respondent explained that he was willing to live in a separate home and not have any contact with his older son. Then, in her closing argument, respondent's counsel conceded that it was in respondent's older son's best interest to terminate parental rights, but argued that this was not true regarding the parental rights to the younger son. Counsel noted, among other things, that the younger son did not want his father's parental rights terminated. Based upon the foregoing, respondent has failed to establish that he was denied the opportunity to present best interest evidence. Further, respondent's appellate brief failed to articulate any evidence that would have been proffered at a best interest hearing that might have led to a different result.

Next, respondent argues that counsel's representation was deficient because trial counsel failed to present an expert witness that might testify that psychological issues prompted respondent's older son to fabricate the allegations of abuse. However, respondent is merely speculating that a witness would testify in support of this theory. Respondent has not specifically identified the nature of the expert testimony or the identity of such a witness, nor has respondent articulated how the witness's testimony, if given, would have affected the outcome of the case. Respondent has failed to establish that there existed a reasonable probability that the result of the proceedings would have been different but for counsel's error.

Next, respondent argues that his counsel failed to adequately cross-examine respondent's son in an effort to attack his credibility. Despite respondent's representations on appeal, respondent's counsel did cross-examine respondent's older son regarding the inconsistencies in his various statements. Respondent has not explained what other inconsistencies existed or how these discrepancies would have undermined the teenager's credibility or affected the outcome of the case. In any event, the trial court acknowledged that some discrepancies were to be expected considering the nature of the trauma and the length of time over which the sexual abuse occurred. Because respondent's son was able to provide great detail in his account of the abuse, and he was consistent with respect to important details, it is unlikely that drawing out some minor discrepancies in other statements would have affected the outcome of the case.

Finally, respondent contends that his counsel failed to prepare for the child protective proceedings and, instead, sought information for the criminal trial. Respondent contends that his counsel missed important information and evidence. However, again, respondent has not identified the missing important information and evidence or how its introduction into the hearing would have affected the outcome of the proceedings. Respondent has failed to demonstrate that he was denied the effective assistance of counsel.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens