STATE OF MICHIGAN

COURT OF APPEALS

In re J. NICKS, Minor.

UNPUBLISHED
December 22, 2015

No. 327352
Genesee Circuit Court
Family Division
LC No. 13-130007-NA

Before: SAWYER, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating her parental rights to the minor child, JN, on six statutory grounds, none of which respondent contests on appeal: (1) MCL 712A.19b(3)(b) ("The child or a sibling of the child has suffered physical injury or physical or sexual abuse" caused by the parent's act or failure to prevent the injury or abuse despite the ability to do so), (2) MCL 712A.19b(3)(c)(*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."), (3) MCL 712A.19b(3)(c)(*ii*) ("Other conditions exist that cause the child to come within the court's jurisdiction . . . and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age."), (4) MCL 712A.19b(3)(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."), (5) MCL 712A.19b(3)(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."), and (6) MCL 712A.19b(3)(k)(*iii*) ("The parent abused the child or a sibling of the child and the abuse included . . . Battering, torture, or other severe physical abuse."). We affirm.

Respondent first argues that, at the termination trial in this matter, her counsel performed ineffectively by failing to consult with, or seek funds to retain, a medical expert, and by failing to object to inadmissible evidence proffered by petitioner, Department of Health and Human Services (DHHS). We disagree.

"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 law context." *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). To properly preserve a claim of ineffective assistance of counsel, a party must move for either a new trial or an evidentiary hearing to develop the record in support of the claim; failure to make any such motion "ordinarily precludes review of the issue unless the appellate record

contains sufficient detail to support the defendant's claim." *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Respondent did not move for a new trial or an evidentiary hearing in the trial court. Thus, our review is limited to "errors that plainly exist on the record[.]" *In re AMB (On Remand)*, 248 Mich App 144, 231-232; 640 NW2d 262 (2001). "Whether [] counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law." *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012).

"This Court has explicitly recognized that the United States Constitution guarantees a right to counsel in parental rights termination cases," and it "has also explicitly recognized that the constitutional right of due process confers on indigent parents the right to appointed counsel at hearings that may involve the termination of their parental rights." *In re Williams*, 286 Mich App 253, 275-276; 779 NW2d 286 (2009); see also MCR 3.971(B)(2) (providing that a respondent must be notified of the right to counsel before entering "a plea of admission or plea of no contest"). As is true in the criminal context, see, e.g., *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012) ("Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise."), when reviewing an attorney's performance in child protective proceedings, "courts traditionally presume an attorney acted effectively absent compelling evidence to the contrary," *AMB (On Remand)*, 248 Mich App at 233. To assert a valid claim of ineffective assistance, a party "must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms[,] (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different," and (3) the ultimate result was "fundamentally unfair or unreliable." *Lockett*, 295 Mich App at 187. The "reviewing court must not evaluate counsel's decisions with the benefit of hindsight," but should "ensure that counsel's actions provided . . . the modicum of representation" constitutionally required. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004), citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

As a preliminary matter, respondent's request that this Court remand for a *Ginther*[1] hearing is improper because it is made in the text of her appellate brief, not in a proper motion to remand under MCR 7.211(C)(1). Even if it is viewed as a motion to remand, respondent's request nevertheless remains improper. Under MCR 7.211(C)(1)(a)(*ii*), a party seeking remand to develop a factual record for appeal must show "that development of a factual record is required for appellate consideration of the issue." Such a motion "must be supported by affidavit or offer of proof regarding the facts to be established at a hearing." MCR 7.211(C)(1); see also *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007) ("Because defendant has not set forth any additional facts that would require development of a record to determine if defense counsel was ineffective, we again deny defendant's request for a remand."). Respondent's request is unsupported by such an affidavit or offer of proof. Thus, she has failed to demonstrate that remand for a *Ginther* hearing is necessary.

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

In any event, respondent's arguments are misplaced. She first argues that her counsel performed ineffectively by failing to object to the introduction of respondent's psychological evaluation at trial, which respondent contends was inadmissible hearsay. In support, respondent cites *In re Gilliam*, 241 Mich App 133, 137; 613 NW2d 748 (2000), for its holding that, "if termination is sought on the basis of one or more circumstances 'new or different' from those that led to the original assumption of jurisdiction, '[l]egally admissible evidence must be used to establish the factual basis of parental unfitness sufficient to warrant termination of parental rights.' " (Quoting former MCR 5.974(E);[2] second alteration in original). Respondent contends that the psychological evaluation was "new or different" from the circumstances that led the trial court to initially assume jurisdiction.

She is correct. Respondent pleaded no contest to the trial court's assumption of jurisdiction. As the factual basis for the plea, the trial court took judicial notice of the contents of the May 3, 2013 supplemental termination petition, which contains no allegations related to respondent's mental health or her psychological evaluation. Thus, the psychological evaluation was both new and different from the circumstances that led to the initial assumption of jurisdiction.

Nevertheless, respondent's claim of ineffective assistance of counsel necessarily fails. Only one statutory ground for termination need be proven by clear and convincing evidence to terminate parental rights. MCL 712A.19b(3); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011) ("Only one statutory ground need be established . . . even if the court erroneously found sufficient evidence under other statutory grounds."). Respondent does not contest the trial court's finding that clear and convincing evidence supported the six statutory grounds it cited, including MCL 712A.19b(3)(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."). By her own testimony and admissions, it was established at trial that respondent failed, throughout the pendency of the child protective proceedings, to document a legal source of income (aside from $194 per month of "food assistance and [] Medicaid") or to obtain suitable housing for her children. The psychological evaluation was unrelated to respondent's failure—without regard to intent—to provide proper care or custody for JN. Thus, respondent cannot demonstrate that she was prejudiced by her trial counsel's purportedly ineffective performance. Since there was clear and convincing evidence supporting termination under MCL 712A.19b(3)(g), it is immaterial whether inadmissible evidence supported the other statutory grounds cited by the trial court.

Likewise, respondent's argument that her counsel failed to consult with or retain a medical expert necessarily fails. At the same time her parental rights to JN were terminated, respondent's parental rights to her other three children, NT, AT, and AJ, were also terminated. The trial court's original assumption of jurisdiction was related to severe injuries suffered by NT, specifically a broken and separated shoulder. Respondent claims that her trial counsel performed

[2] "Former MCR 5.974(E) corresponds to current MCR 3.977(F)." *In re Utrera*, 281 Mich App 1, 18 n 5; 761 NW2d 253 (2008).

ineffectively because he "apparently" failed to consult an independent medical expert about NT's injuries.

"An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), citing *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). It is presumed that counsel's trial strategy is effective; thus, a party challenging counsel's trial strategy must present evidence to rebut the presumption of effectiveness. *Id.* Respondent's argument is premised on what her trial counsel "apparently" did, not what counsel *actually* did—she admits that she is uncertain whether her trial counsel consulted a medical expert. Thus, she has failed to rebut the presumption that her counsel employed effective trial strategy.

Moreover, it is evident from the record that there was no actual dispute regarding the severity or description of NT's injuries. Photographs of the child unconscious on a ventilator appear in the lower court file, and his injuries were so severe that initial attempts to remove him from the ventilator caused his heart to stop beating. At trial, when the court asked the parties, "[I]s everyone in an agreement as to what the doctor had to say in terms of the injuries," the assistant prosecutor representing DHHS responded, "I don't think anybody doubts that those were the injuries." Neither respondent nor her counsel contested that point. Conversely, when asked about NT's injuries, respondent emphasized that she was the person who noticed NT's shoulder injury and "rushed him straight to" the hospital, and she acknowledged that anyone suffering from his injuries would be in excruciating pain. Given the lack of controversy over the extent or nature of NT's injuries, respondent has failed to explain why her counsel should have consulted with an independent medical expert about those injuries or how she was prejudiced by counsel's purported failure to do so.

Finally, as with the admission of respondent's psychological evaluation, the alleged failure of respondent's counsel to consult an independent medical expert is unrelated to MCL 712A.19b(3)(g) as a statutory ground for termination. In other words, the nature and extent of NT's injuries are unrelated to respondent's failure—without regard to intent—to provide proper care or custody for JN. Since only one statutory ground for termination need be proven, MCL 712A.19b(3); *Ellis*, 294 Mich App at 32, and there was clear and convincing evidence supporting termination under MCL 712A.19b(3)(g), respondent cannot demonstrate any prejudice from her counsel's apparent failure to consult an independent expert regarding NT's injuries.

Respondent also argues that the trial court clearly erred by finding that termination was in JN's best interests. We disagree.

We review for clear error the trial court's finding that termination of respondent's parental rights was in JN's best interests. *In re LaFrance Minors*, 306 Mich App 713, 723; 858 NW2d 143 (2014), citing *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2002). "A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made." *LaFrance*, 306 Mich App at 723. This Court defers "to the special ability of the trial court to judge the credibility of witnesses." *Id.* Any related statutory interpretation poses a question of law reviewed de novo. *Id.*

Respondent does not challenge the trial court's finding that six statutory grounds for termination were established by clear and convincing evidence. Therefore, she has abandoned

the issue, and we "assume for purposes of this decision that the [trial] court did not clearly err in finding clear and convincing evidence of the [] statutory grounds for termination[.]" See *In re JS and SM*, 231 Mich App 92, 98-99; 585 NW2d 326 (1999), overruled in part on other grounds by *Trejo*, 462 Mich at 353.

Nevertheless, respondent contends that the trial court clearly erred in determining that termination was in JN's best interests. MCL 712A.19b(5) provides, "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." Although a reviewing court must remain cognizant "that the 'fundamental liberty interest of natural parents in the care, custody, and management of their child[ren] does not evaporate simply because they have not been model parents or have lost temporary custody of their child[ren] to the State,' " *Trejo*, 462 Mich at 373-374 (alterations in original), quoting *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982), "at the best-interest stage, the child's interest in a normal family home is superior to any interest the parent has," *In re Moss*, 301 Mich App 76, 89; 836 NW2d 182 (2013). citing *Santosky*, 455 US at 760. Thus, once a statutory ground for termination has been established by clear and convincing evidence, a preponderance of the evidence can establish that termination is in the best interests of the child. *Moss*, 301 Mich App at 86-90 ("[T]he interests of the child and the parent diverge once the petitioner proves parental unfitness. . . . Although the parent still has an interest in maintaining a relationship with the child, this interest is lessened by the trial court's determination that the parent is unfit to raise the child.").

Respondent supports her argument with an incorrect legal standard. She argues that the trial court clearly erred because there was not "clear and convincing evidence" that respondent was an unfit parent. But at the best interest stage, the trial court was only required to find that a preponderance of the evidence supported its best interest determination. See *Moss*, 301 Mich App at 86-90. Thus, respondent's claim of error is not truly a claim of *error*, and her argument is fatally flawed at the outset. See *In re TK*, 306 Mich App 698, 712; 859 NW2d 208 (2014) (" 'A party cannot simply assert an error or announce a position and then leave it to this Court to discover and rationalize the basis for [her] claims, or unravel and elaborate for [her her] argument, and then search for authority either to sustain or reject [her] position.' ") (alterations in original), quoting *Mitchell v Mitchell*, 296 Mich App 513, 524; 823 NW2d 153 (2012) (quotation marks and citation omitted); see also *Mich Up & Out of Poverty Now Coalition v State*, 210 Mich App 162, 168; 533 NW2d 339 (1995) ("[T]his Court functions as a court of review that is principally charged with the duty of correcting errors.").

In any event, the trial court did not clearly err by finding, under the preponderance standard, that termination of respondent's parental rights was in JN's best interests. On the contrary, the trial court's ruling was supported by at least a preponderance of the evidence.

In its findings, the trial court aptly noted that respondent had failed throughout the proceedings to demonstrate "that she can provide proper care for the children." Consistent with the opinion of the DHHS caseworkers, who believed respondent had failed to benefit from the services and parenting classes she completed, the trial court found that respondent had not benefitted from such services. Given the conflict between respondent's testimony that she benefitted from parenting classes, and a caseworker's testimony that she did not benefit, the trial

court's finding constitutes a credibility determination to which we defer. See *LaFrance*, 306 Mich App at 723. Likewise, the trial court chose to believe the caseworker's testimony that respondent "had difficulty managing the children" during supervised parenting time visits. Again, given respondent's conflicting testimony, the trial court's finding is a credibility determination and is owed deference. *See id.*

Moreover, respondent admittedly failed to complete several ordered services despite ample time to do so, including anger management classes, a foster care supportive visitation program, and domestic violence counseling. While she attended other domestic violence counseling sessions, respondent demonstrated no benefit—within a month, she was hospitalized due to domestic violence injuries. She failed or missed 19 of 35 drug screens, and she admitted that she has "a drug problem" and suffers from depression. Respondent's inability to control her emotional reactions was demonstrated on the record when she interrupted a hearing, without any seeming provocation, and stormed out of the courtroom, slamming the door. She subsequently threatened the father of three of her children in the presence of a DHHS worker.

Respondent failed to attend roughly one out of every three supervised parenting time visits with the children, and her conduct during the visits she attended was troubling. Indeed, in light of NT's severe wrist and shoulder injuries, respondent's conduct is particularly disturbing. During *supervised* visits, she would yell and scream at the children so loudly that security was called. On one occasion, in the caseworker's presence, respondent grabbed the four-year-old AT "by her wrist," picked her up, and dragged her down a hallway at DHHS. After AT's "head smashed into the door," respondent dropped the child on the floor. On another occasion, again while the caseworker was present, respondent told AT and AJ that their poor behavior was the reason that they, NT, and JN had not been returned to respondent. Such conduct took place in a supervised setting where respondent was trying to convince DHHS workers that she could care for the children. Logically, respondent's parental conduct would only worsen in an unsupervised setting.

Finally, it is undisputed that respondent failed to secure suitable housing or to document a legal source of income besides $194 per month of "food assistance and [] Medicaid." Although she admitted that she had the ability to work for a former employer, she was unemployed at the time of trial and living with her mother, where she admitted there was insufficient room to house the children.

Given all of the above, the trial court's best interest determination was not clearly erroneous. A preponderance of the evidence supported its finding that termination of respondent's parental rights was in JN's best interests.

Affirmed.

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Mark T. Boonstra