STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
December 13, 2016

In re PILTZ/TARNACKI, Minors.

No. 332873
Ogemaw Circuit Court
Family Division
LC No. 12-014942-NA

Before: M. J. KELLY, P.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating her parental rights to her minor children, JP, ZP, and NT, pursuant to MCL 712A.19b(3)(c)(*i*) (conditions of adjudication continue to exist), (g) (failure to provide proper care and custody), and (j) (risk of harm if returned to parents). We affirm.

I. BASIC FACTS

In January 2015, petitioner filed a petition seeking removal of the children from their parents' home. The petition alleged that respondent had an ongoing substance abuse problem with prescription medications, was unable to manage the household income provided for the care of the children, and was not cooperating with protective services. The petition also alleged that JP and ZP, the older children, were in the care of their paternal grandmother because respondent's home had no power. Further, it alleged that the youngest child, NT, was in a neonatal intensive care unit because he had been born drug addicted and was suffering from withdrawal symptoms. The first preliminary hearing was continued to allow respondent to consult with a lawyer. At the continued preliminary hearing, respondent stipulated that there were sufficient facts to set the matter for further hearing. The children were placed with petitioner for care and supervision. In February 2015, respondent pleaded to jurisdiction.

Respondent was ordered to comply with a case services plan, and she successfully completed portions of it by obtaining reliable transportation and getting the power turned on at her home. However, during multiple dispositional hearings, the trial court found that respondent's compliance with the plan was inconsistent.

In December 2015, petitioner filed a supplemental petition seeking termination of respondent's parental rights. At the termination hearing, Stacy Levitt-Ruby, a foster care specialist with Child and Family Services Northeast Michigan, testified that the initial case service plan required respondent to participate in a number of services, including parenting

services with supervised parenting time, counseling services, employment services at Michigan Works, emotional stability behavioral services, and services to assist her with housing. More services were added to the plan as the case progressed, including substance abuse counseling through Catholic Human Services, drug testing, services through the Family Dependency Treatment Court, and inpatient substance abuse counseling at Northern Michigan Regional.

According to Levitt-Ruby, respondent fully participated in a psychological evaluation, services that helped her restore power and water to her home, and a service that helped her address her unpaid property taxes. She also testified that respondent was able to get access to reliable transportation.

However, with regard to substance abuse counseling, Levitt-Ruby testified that respondent first attended counseling, then stopped, and then started again. Further, Levitt-Ruby testified that approximately 50% of respondent's drug tests were positive for prescription medications that she was not prescribed. She explained that respondent had been unable to maintain any great length of non-use or non-abuse of prescription medication and that respondent tested positive even during periods when she knew she was pregnant. Levitt-Ruby testified that NT had been removed from respondent's care after he was born addicted to drugs and suffering from withdrawal symptoms. She opined that respondent's continued drug use during her new pregnancy despite the issues it had created for NT showed that respondent had not resolved her prescription drug abuse problem. Moreover, Levitt-Ruby testified that respondent never participated in any of the services that the Family Dependency Treatment Court offered because she could not pass the initial drug screen required for admission into the program. Likewise, respondent was not allowed into the inpatient substance abuse counseling program with Northern Michigan Regional.[1] Levitt-Ruby also testified that respondent "declined inpatient" treatment on January 26, 2016, when her substance abuse counselor recommended it after learning that respondent was pregnant.

With regard to housing and employment, Levitt-Ruby testified that respondent remained unemployed, noting that she had dropped out of the Michigan Works employment program in August 2015 and had only re-enrolled after the termination petition was filed. She testified that respondent was living in a house in West Branch with a man she had recently married who received disability payments. Levitt-Ruby believed it was safe and appropriate for the children.

Regarding parenting time, Levitt-Ruby testified that respondent was scheduled to have it with all three children for one hour once a week, generally on Friday, and then with the infant NT for one hour two additional days a week, generally on Monday and Wednesday. Levitt-Ruby stated that respondent "very seldom missed" the Friday visits, attending "about 90 percent," but that her attendance at "the visits that were just [NT] was around 50 to 51 percent."

[1] Levitt-Ruby was not certain whether a decision had been made on whether to allow her into the program. Nevertheless, it is clear that she did not participate in an inpatient substance abuse program.

In a written opinion, the trial court found that there was clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19(b)(3)(c)(*i*), (g), and (j). The court also found that termination of respondent's parental rights was in the children's best interests.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Respondent argues that her lawyer provided ineffective assistance during the lower court proceedings. When reviewing an ineffective assistance claim in a termination of parental rights case, we apply by analogy the principles of ineffective assistance that have been developed in the criminal law context. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). When reviewing an unpreserved claim of ineffective assistance, we are limited to mistakes that are apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

B. ANALYSIS

In order to prevail on an ineffective assistance claim in a termination of parental rights case, respondent must show that her lawyer's performance was deficient and that the deficient representation prejudiced her. *In re CR*, 250 Mich App 185, 198; 646 NW2d 506 (2002), overruled in part on other grounds *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014).

Respondent first argues that her lawyer was ineffective because, during the preliminary hearing, the lawyer stipulated that there were sufficient facts to set the matter for further hearing. She also notes that her lawyer did not ensure that the court complied with the requirement in MCR 3.965(B)(4) by making sure that respondent had a copy of the petition and either reading the petition to her or finding out if she waived the reading.[2] Moreover, at the continued preliminary hearing, the court was informed that respondent was prepared to stipulate that if the preliminary hearing were held there would be sufficient facts to set the matter for further hearing. Her lawyer expressly stated that respondent would "be waiving." Respondent then stipulated to everything required "if the preliminary hearing were held." There is no indication that she was stipulating to everything required at the preliminary hearing *except* the reading of the allegations in the petition in open court.

Respondent next argues that her lawyer failed to represent her at a January 2015 hearing because, instead of contesting the removal of the children, her lawyer simply rubber stamped the petition. Respondent contends that her lawyer should have "argue[d] the petition should be dismissed or the matter referred to alternate services," but she does not explain what her lawyer

[2] To the extent that respondent's argument can be understood as a claim that she received ineffective assistance because MCR 3.965(B) was not fully satisfied during the initial preliminary hearing, we find her argument to be without merit. The trial court adjourned the initial preliminary hearing so that respondent could consult with a lawyer. Because the requirements of MCR 3.965(B) could be satisfied at either the initial or the continued preliminary hearing, there was no error in initial preliminary hearing.

could have possibly argued to achieve either of these outcomes. Moreover, given that respondent had an unresolved substance abuse problem and had no power in her home, it is not apparent that any such argument would have been successful. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (stating that a defense lawyer "is not required to advocate a meritless position").

Respondent also argues that her lawyer failed to represent her at the termination of parental rights hearing. Specifically, respondent asserts that her lawyer should have known from the discovery packet that petitioner was not going to call any of the service providers to testify, and that her lawyer should have called respondent's service providers as witnesses to testify on respondent's behalf. "[D]ecisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy, and we will not second-guess strategic decisions with the benefit of hindsight." *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013). Respondent argues that the unidentified service provider witnesses may have been able to help her case, but she has not provided an offer of proof as to what exactly who would have testified or what they would have testified to, nor has she explained how their testimony would have affected the outcome of the proceedings. As such, respondent has not met her burden of establishing the factual predicate for her claim of ineffective assistance. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Respondent's claims of ineffective assistance are without merit.

III. REUNIFICATION EFFORTS

A. STANDARD OF REVIEW

Respondent argues that the trial court erred in terminating her parental rights because petitioner did not fulfill its duty to make reasonable efforts to reunite her with her children. Because respondent did not object to the termination decision on the basis that she received inadequate reunification efforts, the issue is unpreserved. See *In re HRC*, 286 Mich App 444, 450; 781 NW2d 105 (2009). Unpreserved claims of error are reviewed for plain error affecting substantial rights. *Id*.

B. ANALYSIS

"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." *Id*. at 462. However, although petitioner "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). Here, respondent was offered numerous services aimed at reunification, including substance abuse counseling, inpatient substance abuse treatment, drug screenings, services to help her regain power and pay her delinquent property taxes, a psychological assessment, and parenting time. She was unable to fully and consistently comply with the offered services. Moreover, given her continued drug problems, the record supports a finding that she did not benefit from the substance abuse services that were offered. Although respondent contends that she should have been offered pain management services,

given her failure to fully comply with the services offered, there is nothing on the record to suggest that she would have successfully complied with and benefited from such services. Accordingly, on this record, we conclude that petitioner made reasonable reunification efforts despite its failure to offer pain management services.

IV. BEST INTERESTS

A. STANDARD OF REVIEW

Finally, respondent argues that the trial court erred in concluding that termination was in the children's best interests. An appellate court "review[s] for clear error . . . the court's decision regarding the child's best interest." *In re Trejo*, 462 Mich 341, 356–357; 612 NW2d 407 (2000). "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss Minors*, 301 Mich App 76, 90; 836 NW2d 182 (2013).

B. ANALYSIS

"In deciding whether termination is in the child's best interests, the court may consider 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." *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). The record reflects that the children had been removed from respondent's care for a significant period of time. Respondent did not consistently attend parenting time with them. Respondent continued to test positive for prescription medication that she was not prescribed. She did not consistently participate in the services offered. Respondent's failure to comply with the case services plan meant that the children's instability continued. As noted by the trial court, the children required a permanent, safe, and stable home, which respondent was not capable of providing, given her persistent failure to get her substance abuse problems under control. Accordingly, on this record the trial court did not clearly err in concluding that termination of respondent's parental rights was in the children's best interests.

Affirmed.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Jane M. Beckering