

STATE OF MICHIGAN
COURT OF APPEALS

In re HALFMANN, Minors.

UNPUBLISHED
February 27, 2018

No. 339496
Wayne Circuit Court
Family Division
LC No. 15-519148-NA

In re HALFMANN, Minors.

No. 339497
Wayne Circuit Court
Family Division
LC No. 15-519148-NA

Before: GLEICHER, P.J., and BORELLO and SWARTZLE, JJ.

PER CURIAM.

In these consolidated appeals, respondent-father M. Halfmann and respondent mother A. Rossiter each appeal as of right the trial court’s order terminating their parental rights to their minor children under MCL 712A.19b(3)(c)(i), (g), and (j). We affirm in both appeals.

I. STATUTORY GROUNDS FOR TERMINATION

On appeal, both respondents argue that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence. We disagree. We review for clear error the court’s factual findings in a proceeding to terminate parental rights. See MCR 3.977(K); *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). “A finding is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.” *Id.* at 91 (internal citation and quotation notation omitted). We must give due regard “to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011).

The trial court terminated respondents’ parental rights under MCL 712A.19b(3)(c)(i), (g), and (j), which permit termination under the following circumstances:

(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 the 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 Conditions Leading to Adjudication Continue to Exist. With respect to § 19b(3)(c)(i), the conditions that led to the initial adjudication for both respondents primarily involved lack of suitable housing and substance abuse. The initial dispositional order was entered in May 2015. Halfmann's treatment plan required him to maintain suitable housing, undergo a substance abuse assessment and follow any recommendations, and attend parenting classes. Rossiter's treatment plan required her to maintain suitable housing, undergo a psychological evaluation, engage in counseling, undergo random drug screens, and attend parenting classes.

After more than 2-1/2 years, Halfmann had exercised parenting time but had not otherwise complied with his treatment plan. Halfmann and his girlfriend allegedly had recently leased a home, but they did not provide petitioner with a copy of the lease. He provided only non-random drug screens for his parole officer, one of which was positive for cocaine, and he refused to submit random drug screens for petitioner. Although Halfmann was allegedly employed, no verification of employment was provided. The evidence showed that Halfmann had substantial opportunities to participate in services, but made only minimal progress in complying with his treatment plan and was terminated from most services for lack of participation. The trial court did not clearly err in finding that termination of Halfmann's parental rights was justified under § 19b(3)(c)(i).

The record similarly showed that after 2-1/2 years, Rossiter had made no progress on her treatment plan. Rossiter did not have suitable housing for the children, she was not employed, and she failed to complete parenting classes. In addition, she submitted multiple positive drug screens. Although Rossiter told the foster care worker that she intended to participate in services, she had not done so despite ample opportunity and was eventually terminated from

services. No evidence supported a finding that she was reasonably likely to rectify the conditions that led to the adjudication within a reasonable time considering the ages of the children, and, therefore the trial court did not clearly err in finding that termination of Rossiter's parental rights was also justified under § 19b(3)(c)(i).

There is No Reasonable Expectation that Respondents Will Be Able to Provide Proper Care and Custody. The evidence also supported termination of respondents' parental rights under § 19b(3)(g). At the time of the termination hearing, the children had been in care for more than 2-1/2 years. Considering Halfmann's lack of progress over this time period, there was no reasonable expectation that he would be able to provide proper care and custody for them within a reasonable time. Similarly, after 2-1/2 years, Rossiter remained without suitable housing, was unemployed, had not completed parenting classes, continued to submit positive drug screens, and had been terminated from services due to her lack of participation. The trial court did not clearly err in finding that termination of respondents' parental rights was also justified under § 19b(3)(g).

A Reasonable Likelihood Exists that the Children Would Be Harmed in Respondents' Care. With respect to § 19b(3)(j), neither past harm nor the risk of physical abuse need be established to terminate parental rights. The risk of emotional harm or neglect may support a finding of a reasonable likelihood of harm to the child. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). At the time of the termination hearing Rossiter was not exercising parenting time and was submitting drug screens that were positive for cocaine. Rossiter indicated at the termination hearing that she intended to comply with her treatment plan, but her history of non-participation in services showed otherwise. Clear and convincing evidence supported termination of Rossiter's parental rights under § 19b(3)(j).

Halfmann does not address the trial court's reliance on § 19b(3)(j) as an additional statutory ground for termination. Thus, we presume that the trial court did not clearly err in finding that this ground was established by clear and convincing evidence. See *In re JS & SM*, 231 Mich App 92, 98-99; 585 NW2d 326 (1999), overruled in part on other grounds by *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000).

II. BEST INTERESTS

Next, both respondents challenge the trial court's decision that termination of their parental rights was in the children's best interests. We review the trial court's findings regarding the children's best interests for clear error. MCR 3.977(K); *In re Rood*, 483 Mich at 90-91.

"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." MCL 712A.19b(5). "[T]he preponderance of the evidence standard applies to the best-interest determination." *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). In determining a child's best interests, the trial court may consider the child's need for stability and permanency and whether the child is progressing in the current placement. *In re VanDalen*, 293 Mich App 120, 141; 809 NW2d 412 (2011). In addition, the trial court may consider the

children's bond to the parent, the parent's parenting ability, and the advantages of a foster home over the parent's home. *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012).

At the time of the termination hearing, the children had lived with their paternal grandmother for more than 2-1/2 years and were doing very well. Although respondents had established a bond with their children, neither respondent had made substantial progress in addressing their parental deficiencies, and there was no reasonable expectation that either respondent would be able to assume custody of the children anytime soon. The trial court considered the fact that the children were in a relative placement, but found that the children deserved permanence and stability, and they could not be expected to wait an undetermined length of time for respondents to develop the motivation to be effective parents. The trial court did not clearly err in finding that termination of respondents' parental rights was in the children's best interests.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Finally, Rossiter argues that she was denied the effective assistance of counsel because her attorney did not appear at two hearings and because her attorney did not request a separate best-interest hearing or present best-interest evidence on her behalf. We disagree.

The principles of ineffective assistance of counsel in criminal cases apply by analogy to proceedings to terminate parental rights. *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 606; 603 NW2d 824 (1999). Because Rossiter did not raise the issue of ineffective assistance of counsel in an appropriate motion in the trial court, our review of this issue is limited to mistakes apparent from the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

Counsel is presumed to have provided effective assistance and Rossiter has the burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, Rossiter must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that, but for counsel's error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Rossiter argues that she was deprived of the effective assistance of counsel because her attorney failed to appear at hearings on February 16, 2017, and May 22, 2017. The record does not reveal why counsel did not appear at these hearings, but Rossiter has not established that she was prejudiced by counsel's failure to appear at either hearing. The trial court did order petitioner to file the petition for termination of parental rights at the February 16 hearing, but the court had previously expressed its intent to do so if respondents did not comply with their treatment plan, and Rossiter does not contend that she was in compliance with her treatment plan at the time of the February 16 hearing. The May 22 hearing was a pretrial hearing, and Rossiter does not identify any adverse decision made at that hearing. Rossiter was represented by counsel at the July 2017 termination hearing and counsel advocated on her behalf. Given Rossiter's failure to establish that she was prejudiced by counsel's failure to appear at the February and May hearings, this claim of ineffective assistance of counsel is without merit.

Rossiter also complains that defense counsel failed to request a separate best-interest hearing or present best-interest evidence on Rossiter's behalf. "Defense counsel's failure to present certain evidence will only constitute ineffective assistance of counsel if it deprived defendant of a substantial defense." *People v Dunigan*, 299 Mich App 579, 589; 831 NW2d 243 (2013). Counsel did make a belated request for a separate best-interest hearing, but the court denied the request as untimely. The court still received evidence relevant to the children's best interests, and it considered the children's best interests at the July 2017 termination hearing. Rossiter does not specify on appeal what additional arguments counsel could have made or what evidence counsel could have presented at a separate hearing that would have made a difference in the outcome of the proceeding. Therefore, Rossiter has not carried her burden of showing that counsel's performance deprived her of a substantial defense.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Stephen L. Borrello

/s/ Brock A. Swartzle