STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
June 18, 2019

In re BURGESS, Minors.

No. 346272
Grand Traverse Circuit Court
Family Division
LC No. 18-004552-NA

Before: K. F. KELLY, P.J., and FORT HOOD and REDFORD, JJ.

PER CURIAM.

Respondent father appeals as of right the trial court's order terminating his parental rights to the eight minor children[1] pursuant to MCL 712A.19b(3)(b)(*i*), (h), (j), and (k). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In April 2018, KB, mother of the children and respondent's wife, discovered that respondent had been sexually abusing their oldest daughter, CB,[2] for more than two years. KB removed the children from the house and contacted law enforcement, who arrested respondent and charged him with first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b) (relationship). Respondent pleaded guilty to three counts of CSC-I and was sentenced to serve 12 to 30 years in prison. His earliest release date is 2030.

Soon after the allegations arose, a petition for removal and termination was filed. KB was not made a respondent to this action. At the time of the termination hearing, the children remained in KB's care, and respondent and KB remained legally married, but with a judgment of separate maintenance. Respondent consented to the trial court taking jurisdiction of the children

[1] In the interest of maintaining the children's privacy, we do not identify them by name in the caption or body of this opinion.

[2] KB had three children when she met respondent. After they married, the couple had five children of their own. Respondent adopted KB's three eldest children in 2010.

and stipulated to his sexual abuse of CB, to his convictions, and to his sentence. Respondent vividly recalled his own sexual abuse committed upon him by his biological father. Further, he explained that he interpreted his sexual relationship with CB as consensual and characterized it as an "affair." Although respondent's stepsister testified to sexual abuse by respondent during their youth, he had no recollection of that conduct. Despite knowing that respondent would be incarcerated and removed from the children's lives for an extensive period of time, respondent protested the termination of his parental rights. Respondent testified that he transferred all assets to KB for the benefit of the family, and this depletion of assets required him to accept court appointed counsel. The trial court found by clear and convincing evidence that there were statutory grounds for termination and that termination was in the children's best interests. On appeal, respondent challenges the trial court's best-interests determination, the effectiveness of both his trial attorneys, and the exclusion of witness testimony.

II. TERMINATION OF PARENTAL RIGHTS

Respondent contends that the court improperly found that termination of his parental rights was in the children's best interests. We disagree. "To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). "We review for clear error a trial court's finding of whether a statutory ground for termination has been proven by clear and convincing evidence." *Id.*; see also MCR 3.997(K).[3] A trial court's decision regarding a child's best interests is also reviewed for clear error. *In re Laster*, 303 Mich App 485, 496; 845 NW2d 540 (2013). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *Id.* at 491 (citation omitted). This Court reviews de novo the trial court's selection, interpretation, and application of the relevant statutory provisions. *In re Gonzales/Martinez*, 310 Mich App 426, 431; 871 NW2d 868 (2015).

"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). "[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*, 301 Mich App at 90. All available evidence should be weighed to determine the children's best interests. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). The best interest determination focuses

[3] Although respondent does not dispute the satisfaction of the statutory grounds for termination, we note that MCL 712A.19b(3)(b)(*i*) (child suffered sexual abuse caused by the parent's act), (h) (failure to provide proper care and custody due to parental imprisonment for more than two years),(j) (reasonable likelihood of harm if returned to the parent's custody), and (k) (parental sexual abuse of child or sibling) were satisfied by clear and convincing evidence in light of respondent's admission to the sexual abuse of CB, his guilty plea to three counts of CSC-1, and the family interviews.

on the child, rather than the parent. *In re Schadler*, 315 Mich App 406, 411; 890 NW2d 676 (2016). Factors to consider when determining the child's best interests include the child's bond to the parent, the parent's parenting skills, the child's need for permanency, stability, and finality, the advantages of a foster home over the parent's home, and the child's placement with relatives. *Id*. The trial court must explicitly address whether termination is appropriate when a child is placed with relatives. *Id*. However, a child's placement with relatives is a factor that the trial court must consider, and the placement will not weigh against termination when the parent fails to make necessary changes to address mental health issues. See *In re Gonzales/Martinez*, 310 Mich App at 434-435. The interests of each individual child must be addressed if their best interests significantly differ. *In re White*, 303 Mich App at 715. The trial court has the discretion to consider whether a guardianship is in the child's best interest. *In re COH*, 495 Mich 184, 202; 848 NW2d 107 (2014).

The trial court did not clearly err by concluding that termination of parental rights was in the children's best interests. In the present case, respondent did not contest that he had sexually abused CB for a period of two years, that he had been convicted of three counts of CSC-I, and that he had been sentenced to serve 12 to 30 years in prison. Respondent acknowledged that his abuse of CB would not have ended except KB returned home and found the two naked in bed together while the couple's youngest child slept in the same bed. Respondent characterized the abuse as consensual and an affair, and he described his actions as unplanned. However, to avoid being caught, respondent used a tracking system on KB's cellular phone to alert him when she returned home, separated the children from CB, tracked CB's menstrual cycle, and advised CB that he would go to prison if she revealed the abuse. CB also reported that respondent would touch her inappropriately while shielded under a blanket when other people were present in the room. A CPS worker opined that termination was in the children's best interests based on the ongoing abuse. Furthermore, respondent's stepsister testified that respondent had sexually abused her as a child over a period of many years. Thus, respondent's repeated conduct and planning was indicative of manipulation and predatory.

To determine if termination of parental rights was in the children's best interests, the court considered the children's placement with their mother, KB. However, the court noted that KB sought to continue the relationship despite respondent's imprisonment. Although KB indicated that she would rely on experts to determine if the children should communicate with or visit respondent in prison, the children had not been examined by an expert. KB reportedly had a safety plan for the children, but it was not shared with the court. The court also cited the children's need for permanency and stability and the fact that some of the children felt unsafe in their home, with one child even characterizing it as a crime scene. After examining the facts and circumstances, including the length of respondent's prison sentence, the trial court did not err in concluding that termination was in the children's best interests. See *In re Schadler*, 315 Mich App 406, 411; 890 NW2d 676 (2016) (holding that the trial court did not clearly err in determining that termination was in the children's best interests when the respondent had sexually abused the child); *In re Jenks*, 281 Mich App 514, 519; 760 NW2d 297 (2008) (holding that the trial court did not clearly err in determining that termination was in the children's best interests based on "the nature of respondent's criminal sexual conduct with the minor children's half-sister and the length of his incarceration for that offense").

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent next argues that his trial attorneys were ineffective for failing to file a timely witness list and for failing to call Dr. John Ulrich and Dr. Amelia Siders at trial. We disagree. Respondent failed to preserve this issue for review, and "[u]npreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the record." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012).

"[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002), overruled on other grounds by *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014) (quotation marks and citation omitted). There is a strong presumption that trial counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012) (quotation marks omitted), quoting *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and a defendant has a "heavy burden" to show otherwise, *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). For an ineffective assistance of counsel claim to be successful, a defendant must show: (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 688, 694; see also *People v Ullah*, 216 Mich App 669, 684-685; 550 NW2d 568 (1996). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694. "A defendant must also show that the result that did occur was fundamentally unfair or unreliable." *Lockett*, 295 Mich App at 187. Furthermore, examination of counsel's actions must be "highly deferential" and without the benefit of hindsight, *Strickland*, 466 US at 689, and there is a "strong presumption" that counsel's actions came from "sound trial strategy," *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). With regard to trial strategy, this Court must not substitute its judgment for that of counsel. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

In the present case, we conclude on the basis of the record that respondent's attorneys' actions did not fall below an objective standard of reasonableness. The trial court did not exclude respondent's proposed witnesses premised on the timeliness of the filing of the witness list.[4] Rather, the trial court disallowed the testimony of Dr. Ulrich by concluding that his testimony addressing intrafamilial sex offender recidivism rates was irrelevant to the statutory grounds for termination of parental rights and the best interest factors. Further, the court noted that it was familiar with the tests and recidivism rates.[5] With regard to the testimony of Dr. Siders, the trial court held that her testimony was absolutely relevant because she had engaged in

[4] Although counsel for petitioner objected to the timeliness, the trial court expressly stated that both attorneys that represented respondent "did what they needed to do in [the] time frames that they had."

[5] We note that after the court expressed its existing knowledge of the low recidivism rate testimony offered by Dr. Ulrich and agreed to consider that fact in its determination, respondent seemingly withdrew the argument in support of Dr. Ulrich's testimony.

counseling with the children. However, at the start of the termination hearing, respondent withdrew its intent to call Dr. Siders as a witness.[6]

Finally, respondent cannot establish prejudice even assuming that counsel's actions fell below an objective standard of reasonableness. As previously discussed, there was ample evidence for the trial court to find that termination was in the children's best interests. Respondent stipulated to his conduct against CB, and he has failed to demonstrate how the expert testimony would have altered the outcome.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood
/s/ James Robert Redford

[6] Respondent contends on appeal that counsel was ineffective for failing to call Dr. Siders to testify. Although the trial court agreed that the testimony was relevant, respondent's counsel withdrew his intent to call her as a witness after conferring with KB and respondent. A party may not waive objection to an issue before the trial court and raise the issue on appeal because to do so would allow a party to harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Moreover, respondent failed to present evidentiary support regarding the substance of her testimony. In light of this deficiency, respondent failed to meet his burden of demonstrating ineffective assistance of counsel.