STATE OF MICHIGAN

COURT OF APPEALS

In re H. MCFALL, Minor.

UNPUBLISHED
October 14, 2021

No. 356490
Cheboygan Circuit Court
Family Division
LC No. 18-008746-NA

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

PER CURIAM.

Respondent appeals as of right the trial court's order terminating her parental rights to the minor child, HM, under MCL 712A.19b(3)(c)(*i*), (g), and (j). On appeal, respondent argues that the trial court erred by finding that petitioner, the Department of Health and Human Services (DHHS) made reasonable efforts toward reunification, declining to suppress the drug-screening results, and concluding that termination of respondent's parental rights was in the best interests of HM. We affirm.

I. BACKGROUND FACTS

This case arises out of a petition filed by the DHHS alleging that respondent used controlled substances to the point that HM found respondent naked and unconscious with a needle in her arm. The petition also alleged that respondent had physical altercations in front of her children,[1] lacked stable housing and transportation, neglected the children's needs, physically abused HM, left the children with others, and had a pending criminal case. At a preliminary hearing, respondent did not object to the trial court's taking of jurisdiction, and the trial court authorized the petition.

Respondent signed a parent-agency agreement and began the ordered services, including random drug screening, a psychological evaluation, counseling services, a substance-abuse assessment, parenting classes, and parenting time. Respondent's progress with the services was challenging, given that she was incarcerated numerous times. Additionally, respondent was sporadic with her drug screens and substance-abuse treatment when she was not incarcerated.

[1] We note that respondent has other children that are not involved in this appeal.

Although there were scheduling errors with the drug screens, respondent continued to test positive for controlled substances.

At the termination hearing, respondent complained that she had been assigned six caseworkers, which created chaos about the communication, provision, and coordination of services. For example, respondent asserted that she had consistently requested inpatient drug treatment, but had only been referred to inpatient treatment two months earlier. After three days of testimony, the trial court found that the DHHS offered reasonable services to respondent, that the grounds for termination had been proven by clear and convincing evidence, and that termination was in HM's best interests. The trial court terminated respondent's parental rights. This appeal followed.

II. REASONABLE EFFORTS

Respondent first argues that reversal is required because the DHHS and its contracting agency, Wellspring Lutheran Services (Wellspring), failed to make reasonable efforts to reunify respondent with HM. We disagree.

We review for clear error a trial court's decision regarding reasonable efforts at reunification. *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005). "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." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (quotation marks and citation omitted; alteration in original).

It is well-established that "reasonable efforts to reunify the child and family must be made in all cases." MCL 712A.19a(2). Although the DHHS "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). "Not only must respondent cooperate and participate in the services, she must benefit from them." *In re TK*, 306 Mich App 698, 711; 859 NW2d 208 (2014).

A. INPATIENT SERVICES

Respondent first argues that the DHHS and Wellspring did not expend reasonable efforts toward reunification because caseworkers from both agencies did not actively assist respondent in contacting various inpatient treatment facilities and completing the admission process. In particular, respondent takes issue with the "passive" assistance the DHHS and Wellspring provided to her. Respondent is correct that several witnesses, including Heather Demos, one of the caseworkers, and Timothy Strauss, who evaluated respondent's parental fitness, opined that respondent would have benefited from inpatient substance-abuse treatment.

However, testimony was presented that respondent was offered assistance with placement in an inpatient facility several times. Foster Care Supervisor Ashlynn Crichton acknowledged that respondent said in October 2018, that she wanted to enter inpatient treatment because she felt that was the only way she would be able to achieve sobriety. At that time, however, respondent was on bond for pending criminal charges and could not enter an inpatient facility.

Bridget Goss, a supervisor from Wellspring, testified that respondent was provided with referrals for inpatient treatment in January and February 2019. Respondent was given a referral to Harbor Hall for a substance-abuse assessment and to start services. According to Goss, respondent was advised to attend inpatient treatment, but she wanted to wait until her Otsego County criminal matter was resolved before making any decisions.

And Demos testified that she tried to help respondent enter inpatient treatment in November 2019. Respondent declined because the program was too strict and she would not be able to continue visitation with HM while she was a resident.

Goss further testified that respondent had discussed inpatient treatment with a caseworker, Theresa Wozniak, on April 6, 2020, but respondent told Wozniak that a rehabilitation program would take a year and she did not want to be away from HM for that long. Goss also testified that she and a worker with Child Protective Services made another referral for inpatient treatment in November 2020, and provided respondent with the contact information for Northern Michigan Regional Entity (NMRE), which handled intake requests, placement, and payment.

In addition, according to Kathleen Mason, a therapist at Harbor Hall, at other times during the proceedings, respondent was not eligible to enter an inpatient program because she was in sobriety at the time. Mason also testified that respondent would not have qualified for inpatient treatment unless she was having withdrawal symptoms, because of the lack of funding or because NMRE would have wanted respondent to try outpatient treatment first. Respondent did enter Joppa House, a sober house in Petoskey that she qualified for, but she was asked to leave within two weeks because she would not participate in its programs.

With respect to the allegedly passive referrals, Crichton testified that it was the parent's responsibility to first call NMRE, the contact agency for inpatient treatment. NMRE would then assess the parent to determine if NMRE would pay for the treatment. If approved, NMRE would find the parent a bed and would handle transportation to the facility. Crichton agreed with Goss that a parent seeking inpatient treatment must be very honest, open, and upfront about what they were using, how frequently, and when the last use occurred, which was not information a private agency or the DHHS could provide. Goss provided similar testimony. Goss also testified that respondent was aware of how to complete the NMRE intake process and had done so in the past.

Considering this testimony, the trial court did not clearly err by finding that the DHHS and Wellspring caseworkers had made reasonable efforts to provide respondent with inpatient substance-abuse treatment.

B. NUMBER OF CASEWORKERS

Respondent also argues that reasonable efforts at reunification were not made because the large number of caseworkers involved affected their ability to properly follow up on contacts provided to respondent and to ensure that visits and contacts occurred when they were supposed to. The record does indicate that a larger than usual number of caseworkers were involved in servicing respondent's case, which was attributed to high employee turnover. Although respondent blames this for her inability to comply with services, she ignores the impact her three incarcerations had on her ability to have continuous services with one or some of the caseworkers.

She also ignores her own failure to fully participate in services, including being asked to leave Joppa House after 18 days because she refused to participate in the programs. Indeed, her therapist discharged her from counseling services because of her continued failure to attend appointments.

Respondent argues that the high turnover led to confusion about visitations. Some of this confusion involved whether respondent's other children would attend visits. Respondent also ignores the effect of the COVID-19 pandemic on visitation schedules. In any event, although there were some issues with visitation, at the termination hearing on January 29, 2021, Goss testified that respondent had not visited HM since September 29, 2020, because of respondent's failure to participate in drug testing.

Although the number of caseworkers may have led to some disruptions in the provision of services, the record does not demonstrate that necessary services were not offered or provided. Rather the record shows that it was respondent's incarcerations and failure to fully participate or engage in the various services that were the primary barriers to reunification. Respondent has not demonstrated that the total number of caseworkers involved precluded the trial court from finding that DHHS and Wellspring made reasonable efforts toward reunification.

C. PROSECUTOR MISCONDUCT

Respondent also argues that a relationship between the Chief Assistant Prosecutor and one of the caseworkers prevented her from receiving reasonable reunification services. After the relationship was disclosed, the trial court considered the question at a hearing to determine what impact, if any, it may have had on respondent's case, including the provision of services, and whether it required disqualification of the entire prosecutor's office from representing petitioner.

The disqualification of a prosecutor because of a conflict of interest may be warranted where the prosecutor has a personal, financial, or emotional interest in the litigation, or a personal relationship with a party. *People v Herrick*, 216 Mich App 594, 599; 550 NW2d 541 (1996); *People v Doyle*, 159 Mich App 632, 641-642, 406 NW2d 893 (1987), mod on rehearing 161 Mich App 743 (1987). If a conflict of interest is determined to exist, the question then arises whether the entire prosecutor's office must be disqualified. *Doyle*, 159 Mich App at 644. "If the . . . prosecuting attorney concerned in the conflict of interest has supervisory authority over other attorneys in the office, or has policy-making authority, then recusal of the entire office is likely to be necessary." *Id*. at 645; see also *In re Osborne*, 459 Mich 360, 369; 589 NW2d 763 (1999).

In the instant case, the Cheboygan County Prosecutor explained that the involved Chief Assistant Prosecutor was assigned to abuse and neglect cases, but denied that he had a supervisory role over other assistant prosecuting attorneys in the office. The relationship in question apparently began in December 2019, well after respondent had entered a plea to allow the trial court to exercise jurisdiction over HM in September 2018. Thus, the relationship did not affect or influence the trial court's jurisdiction.

In addition, a new caseworker was assigned to respondent's case and the involved Chief Assistant Prosecutor had resigned his position. The involved caseworker testified that the relationship had no effect on her handling of respondent's case, which she treated like any other

case. And respondent signed the parent-agency agreement and began services in November 2018, which was before the relationship began. Respondent has not otherwise demonstrated how the relationship affected her services, particularly where she was incarcerated for periods of time and did not pursue additional inpatient services to address her substance-abuse problem. After the relationship was disclosed, the trial court agreed to adjourn a scheduled termination hearing until September 2020, which provided respondent with additional time to participate in and benefit from services, with a new caseworker. Under these circumstances, respondent has not demonstrated that the relationship between the Chief Assistant Prosecutor and one of the caseworkers either impacted the trial court's exercise of jurisdiction over HM or the reasonableness of the reunification services provided.

In sum, respondent has not demonstrated that the trial court clearly erred by finding that the DHHS and Wellspring made reasonable efforts to reunify respondent with HM.[2]

III. DRUG-TESTING RESULTS

Respondent next argues that there were problems with the drug-screening testing facilities, Advanced Drug Testing and Averhealth, thereby rendering her drug-screen results unreliable. Accordingly, she argues that the trial court erred by denying her motion to set aside the drug-screen results and considering them at the termination hearing. In essence, respondent is challenging the trial court's decision to allow petitioner to present evidence of the drug-screen results at the termination hearing. We disagree.

We review a trial court's decision to admit evidence at a termination hearing for an abuse of discretion. *In re Hill*, 221 Mich App 683, 696; 562 NW2d 254 (1997). "An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes." *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008) (quotation marks and citation omitted).

Respondent appears to present two arguments concerning the drug-testing results: (1) that scheduling conflicts with Advanced Drug Testing were somehow detrimental to the reunification efforts because respondent's caseworkers treated them as missed screens; and (2) the test results were unreliable because of irregularities in testing that were discovered in a different case.

With respect to the scheduling issues, Megan Hawver, a drug-test collector for Advanced Drug Testing, testified that the facility had handled respondent's drug screenings for approximately four months. She acknowledged that her facility was not open on Tuesdays, but there was one tester who could perform drug testing from 4:45 p.m. until 6:00 p.m. on Tuesdays. Hawver maintained that she informed the caseworkers at Averhealth that her company was closed on Tuesdays, but Averhealth still scheduled call-ins for Tuesdays, including for respondent. Hawver also learned that Averhealth never recorded the Tuesday closures in its computer system. According to Hawver, however, this was only a problem for the first few Tuesdays before Hawver

[2] We note that respondent mentions that there was an issue with gas cards, but does not advance an argument as to what the issue was or how it impacted the case. Therefore, this issue is abandoned. *In re Rippy*, 330 Mich App 350, 362 n 5; 948 NW2d 131 (2019). Moreover, there was testimony that respondent was provided gas cards, which refutes respondent's claim of error.

made the DHHS workers aware of the situation. Therefore, at most, any miscommunication between Averhealth, Advanced Drug Testing, and respondent may have resulted in only a small number of missed screens. There is no basis for concluding that these scheduling issues had any impact on the case considering that they were confined to a limited period, and that respondent admitted relapsing at different times throughout the proceedings, having a number of positive drug screens, and missing many more screens.

Respondent also notes that Goss testified about other scheduling issues with respect to screening. Respondent's counsel questioned Goss about allegedly missed drug screens. Respondent's counsel stated that it appeared from Goss's report that there had been a scheduling issue about a drug screening that was to have occurred on Veteran's Day. Goss acknowledged that a scheduling error had occurred with Averhealth for a screening on November 13, 2019, but testified that it was not counted as a missed screen. Goss testified that Demos reviewed the drug-screening reports and found that the November 13, 2019 screening was the only apparent abnormality in the system. However, Goss later testified that respondent was given credit for scheduling errors on November 5, 2019, and on November 11, 2019. Therefore, to the extent that there was an error, it appears to have been resolved in respondent's favor.

With respect to the reliability of the test results, the trial court considered this issue at a hearing when it addressed respondent's motion to set aside the drug-screen results. Dr. Michele Glinn, Ph.D., the laboratory director for Averhealth, testified about respondent's allegations that there had been false positives in her drug screens. Dr. Glinn maintained that none of respondent's tests contained false positives. She testified that she reviews all of the quality control data and instrument data on a regular basis. When asked about a judge's inquiry about a false positive in a different case, Dr. Glinn explained that she discovered that the cause of that false positive was an error in the loading process and that Averhealth internally disciplined the employees involved, provided retraining, and added a safeguard that two employees were now required to check the samples in the trays.

At the termination hearing, Dr. Glinn again discussed the drug-testing procedure, the differences between testing methods, and the feasibility of retesting samples, including the possible degradation of the samples. Dr. Glinn discussed four of respondent's samples that the laboratory had retested. One of the samples no longer tested positive for cocaine, but that was expected because cocaine degrades over time, and the sample still tested positive for benzoylecgonine, a cocaine metabolite. The other samples again tested positive for various controlled substances, although in lesser amounts, consistent with the samples degrading over time. Dr. Glinn also maintained that there had been no ongoing issues in the laboratory with false positive tests after Averhealth changed its procedures. Given this testimony, respondent has not demonstrated that the trial court abused its discretion or otherwise erred by denying her motion to exclude the drug-screen results. The evidence did not demonstrate that the testing was so unreliable that the trial could not consider it.

IV. BEST INTERESTS

Respondent also argues that the trial court erred by finding that termination of her parental rights was in HM's best interests. We disagree.

We review for clear error a trial court's finding that termination of parental rights is in a child's best interests. *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 63; 874 NW2d 205 (2015). "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." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004). See also MCR 2.613(C).

"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). Whether termination of parental rights is in a child's best interests is determined by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). Factors to be considered include "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*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). A court may also consider whether it is likely "that the child could be returned to her parents' home within the foreseeable future, if at all." *In re Frey*, 297 Mich App at 248-249.

In the instant case, the trial court did not clearly err by finding that termination of respondent's parental rights was in HM's best interests. When the termination hearing concluded, HM had been a court ward for almost two- and one-half years. Respondent made little progress during that period, and she was unable to resolve her substance-abuse problem. Further, she remained unemployed, lacked housing, and was incarcerated for a third time, the last time for domestic violence because of a number of altercations with the father of one of respondent's other children.

Respondent maintains that it was illogical for the court to find that she was not fit to be reunified with HM when she was deemed fit enough to live in the same home as her other child. However, the court never made a finding that the other child could safely be placed in respondent's custody. Rather, the court placed the other child in the custody of his father and respondent later moved into their home. The evidence showed that this relationship was strained and marked by domestic violence, which led to police involvement and respondent's incarceration. At the termination hearing, respondent agreed that it was no longer good to have the father involved in her life. To whatever extent respondent was allowed to live in the same household as her other child after the court placed the other child with his father, the evidence of that relationship did not weigh in favor of finding that HM's best interests would be served by being reunited with respondent.

In contrast, the evidence showed that HM was living in a safe and stable household with her foster parents, and wanted to remain there. The foster parents both testified that they would be willing to adopt her. Other witnesses testified that HM needed stability and structure. Timothy Strauss, who evaluated HM in December 2020, found that she was still behind socially and insecure in her attachments to others. Strauss stated that HM needed an environment with a lot of structure, stability, and routine. Strauss agreed that HM would likely regress if she was returned to respondent's home and respondent continued to use controlled substances. He also explained that HM's language development and scholastic functioning would be impaired and she would

exhibit greater anxiety. Strauss believed it would take a minimum of approximately 18 months before HM could safely be returned to respondent.

HM's therapist, Caitlin Stahlbaum, similarly testified that HM needed a consistent environment, one with routine and structure, where she felt safe. Stahlbaum did not have any concerns about the foster family. Although testimony was presented about HM's strong bond with respondent, the evidence also showed that it had been approximately five months since respondent last visited with HM and, in any event, this bond alone was insufficient to render the trial court's decision clearly erroneous in light of the evidence of HM's strong need for consistency, structure, and stability, which respondent was in no position to provide anytime soon. See *In re White*, 303 Mich App 701, 713-714; 846 NW2d 61 (2014) (determining that testimony that a child and a respondent shared a strong bond was insufficient to show that termination was not in the child's best interests when there was competing evidence that termination was in the child's best interest).

Respondent also argues that the DHHS failed to properly consider relative placement. When a child has been placed with a relative, the trial court is required to consider that as an explicit factor that weighs against termination. MCL712A.19a(8)(a);*In re Schadler*, 315 Mich App 406, 411; 890 NW2d 676 (2016). In this case, however, relative placement was explored, but found to be unsuitable. Although HM's sibling had been placed in a guardianship with respondent's mother, caseworker Danielle Rhode testified that HM could not be placed with respondent's mother because of the lack of space. Although respondent's mother offered to resolve the issue, the DHHS did not hear anything further from her until a month before the termination hearing.

The evidence also showed that the DHHS explored placing HM with respondent's cousin in Florida. Indeed, the DHHS made extensive efforts to promote and foster a relationship between the cousin's family and HM. However, testimony was also presented that this process and attempts to establish a relationship with the cousin's family was highly disruptive to HM. HM's therapist testified that HM's behaviors had become more negative after visits with the cousin's family; she became more emotionally dysregulated, could not control her emotions, and became more "clingy" with her foster family. These behaviors continued. HM also told the therapist that she did not want the visits to continue. The foster mother stated that HM would misbehave after telephone conversations with the cousin, and had a setback when she was shown photographs of where she might be living and going to school in Florida. In light of this evidence, the trial court did not clearly err by finding that HM's best interests would not be served by a placement with the cousin's family in Florida, particularly when HM's siblings remained in Michigan.

In sum, the trial court did not clearly err by finding that termination of respondent's parental rights was in HM's best interests.

Affirmed.

/s/ James Robert Redford
/s/ Kirsten Frank Kelly
/s/ Anica Letica