STATE OF MICHIGAN

COURT OF APPEALS

In re N. R. PALMER, Minor.

UNPUBLISHED
December 16, 2021

No. 356509
Wayne Circuit Court
Family Division
LC No. 2017-001931-NA

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating her parental rights to the minor child. The trial court terminated respondent's parental rights pursuant to respondent's admission to MCL 712A.19b(3)(a)(*i*) (parent unidentifiable and deserted for 28 days or more), (a)(*ii*) (desertion for 91 days or more), (b)(*i*) (the child or a sibling has suffered physical injury or sexual abuse, caused by the parent's act, and there is a reasonable likelihood that the child would suffer from injury or abuse in the foreseeable future if placed with the parent), (c)(*i*) (conditions that led to the adjudication continue to exist), (c)(*ii*) (failure to rectify other conditions), (g) (failure to provide proper care and custody), (i) (parental rights to another child have been terminated and parent has failed to rectify the conditions), and (j) (reasonable likelihood the child will be harmed if returned to the home). We affirm.

I. BACKGROUND

The minor child was born in November 2017 with tetrahydrocannabinol (THC) and methadone in her system, and experiencing symptoms of withdrawals. For two months, she remained in the hospital to be treated with morphine and phenobarbital. The Department of Health and Human Services (DHHS) petitioned the trial court to remove the child from the care of her parents and terminate their parental rights.[1] The child was placed with her paternal grandmother, CP, who was also caring for the child's full sibling under the terms of a guardianship.

[1] The minor child's father was initially a respondent in these proceedings, but he died before the proceedings were concluded.

Following a bench trial, the court assumed jurisdiction over the minor child due to respondent's failure to secure prenatal care and substance abuse. But the court declined to terminate respondent's rights, despite statutory grounds to do so under MCL 712A.19b(3)(b)(*i*), (g), and (j), because it did not believe termination to be in the child's best interests. Accordingly, an initial dispositional order was entered on March 22, 2018, requiring respondent to participate in a case service plan.

For nearly two years, respondent participated in that service plan. She completed a parenting class, a psychological evaluation, a psychiatric evaluation, and secured substance abuse and mental health treatment. While she engaged in weekly supervised visits and random drug screens, she missed about half of each for most reporting periods. Respondent was also incarcerated from November 2019 to July 2020 for violating probation by smoking marijuana and leaving the halfway house she was required to live in. Thus, DHHS filed a supplemental petition to terminate respondent's parental rights on March 5, 2020.

On December 10, 2020, respondent entered what the parties referred to as a plea to statutory grounds for termination. The trial court questioned respondent to ensure she was voluntarily and knowingly entering her plea, and took testimony to serve as a factual basis. The court then held a three-day best-interest hearing, after which it found termination to be in the child's best interests and entered an order terminating respondent's parental rights. Respondent now appeals.

II. STATUTORY GROUNDS

Respondent argues the trial court erred by accepting her plea to statutory grounds because it was not supported by the factual basis she provided with her testimony. We disagree.

We review this claim of error under the plain-error rule because respondent failed to preserve the claim by objecting to the trial court's plea-taking process below or moving the trial court to withdraw her plea. *In re Pederson*, 331 Mich App 445, 462-463; 951 NW2d 704 (2020). To obtain relief from such an error,

> 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) . . . the plain error affected substantial rights . . . [, and 4)] once a [respondent] satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted . . . when the plain, forfeited error . . . seriously affected the fairness, integrity or public reputation of judicial proceedings . . . . [*Id*. at 463 (citations omitted; first alteration in original).]

Parental rights may be terminated if a trial court finds one of the circumstances in MCL 712A.19b(3) proved by clear and convincing evidence. Those circumstances include:

> (a) The child has been deserted under either of the following circumstances:
>
> (*i*) The child's parent is unidentifiable, has deserted the child for 28 or more days, and has not sought custody of the child during that period. . . .
>
> (*ii*) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(*i*) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(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.

(*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(g) The parent, although, in the court's discretion, financially able to do so, 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.

* * *

(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and the parent has failed to rectify the conditions that led to the prior termination of parental rights.

(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. [MCL 712A.19b(3).]

In its supplemental petition, DHHS sought termination of respondent's parental rights under MCL 712A.19b(3)(a)(*ii*), (b)(*i*), (c)(*i*), (c)(*ii*), (g), (i), and (j). Respondent agreed "to admit that there [were] grounds to terminate [her] rights, but reserve[d] the right to contest whether or not the [trial c]ourt should terminate [her] rights based on best interest[s]." At no point while she was entering the plea did the parties or trial court clarify to which statutory grounds respondent was pleading, but in its order terminating respondent's parental rights, the court clarified it relied

upon MCL 712A.19b(3)(a)(*i*), (a)(*ii*), (b)(*i*), (c)(*i*), (c)(*ii*), (g), (i), and (j). Respondent testified to provide a factual basis for her plea. Specifically, she testified the minor child suffered symptoms of withdrawal from THC and methadone when she was born. Respondent was planning to move out of the halfway house in which she resided, but was awaiting her identification card being issued and had not had the home assessed by DHHS. Respondent did not have a source of income and she had never had a job, but she was attempting to obtain social security benefits. Respondent had been incarcerated from November 2019 to July 2020 for violating probation by smoking marijuana and leaving her halfway house, and she participated in substance abuse treatment after her release. Respondent had not consistently drug screened, and some of the missed screens would have been positive for unprescribed drugs. Respondent conceded her substance abuse was an ongoing problem and that she required additional services.

The trial court erred by finding MCL 712A19b(3)(a)(*i*), (a)(*ii*), (c)(*ii*), and (i) proved by clear and convincing evidence. Respondent had certainly been identified as the minor child's parent as this was the second attempt to terminate her parental rights to NRP. Thus, MCL 712A.19b(3)(a)(*i*) was not a basis to terminate respondent's parental rights. In addition, MCL 712A.19b(3)(a)(*ii*) requires the parent abandon the child and fail to seek custody of the child. Respondent did not abandon the child; she was incarcerated. See *In re Mason*, 486 Mich 142, 160; 782 NW2d 747 (2010) (noting that incarceration alone is not a basis to terminate parental rights). Moreover, respondent had no need to seek custody of the minor child because she already had custody, although the court had temporarily removed the child from respondent's care. Therefore, MCL 712A.19b(3)(a)(*ii*) was also not a basis to terminate respondent's parental rights. With respect to MCL 712A.19b(3)(c)(*ii*), neither DHHS nor the trial court ever identified what conditions existed other than those that brought the minor child within the court's jurisdiction that respondent failed to rectify after receiving recommendations, notice, a hearing, and a reasonable opportunity to rectify. Thus, the record did not support this finding. Finally, the record is abundantly clear that respondent's parental rights to her other four children were never terminated, so termination under MCL 712A.19b(3)(i) was improper.

Nevertheless, the trial court did not plainly err by accepting respondent's plea with respect to the other grounds for termination identified earlier. Respondent admitted the minor child was born suffering withdrawal symptoms from THC and methadone. That is a physical injury caused by respondent's act of consuming drugs while pregnant, satisfying MCL 712A.19b(3)(b)(*i*). With respect to MCL 712A.19b(3)(c)(*i*), the trial court assumed jurisdiction over the child due to respondent's failure to obtain prenatal care and substance use while pregnant. As respondent testified when entering her plea, she continued to struggle with substance abuse. Indeed, she violated probation only a few months before the supplemental petition was filed by smoking marijuana and leaving a halfway house. Finally, these proceedings were ongoing for over three years, and respondent was yet to be living in a home suitable for the minor child or have a source of income due to her continuing need to address her substance abuse. Thus, the trial court's conclusion that the conditions that led to the adjudication continued to exist and there was not a reasonable likelihood the conditions would be rectified within a reasonable time considering the child's age was not plainly erroneous. MCL 712A.19b(3)(c)(*i*). The trial court's findings regarding MCL 712A.19b(3)(g) and (j) were also not plainly erroneous for the same reasons. Respondent's substance abuse caused her to be unable to provide proper care and custody for the minor child when she was born or for the three years that followed. When the court accepted respondent's plea, she was living in a halfway house and unable to provide a home for the child.

Accordingly, the trial court did not plainly err by concluding there was a reasonable likelihood respondent would be unable to provide proper care and custody in a reasonable time considering the child's age and that the child was likely to be harmed if returned to respondent's care. See MCL 712A.19b(3)(g) and (j).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent argues that her counsel was ineffective for advising her to plead to statutory grounds for termination of her parental rights. Specifically, respondent argues the testimony at the subsequent best-interest hearing indicated respondent had participated in her case service plan, so it was ineffective to advise respondent to concede statutory grounds. We disagree.

Whether a person was denied effective assistance of counsel generally presents a mixed question of fact and constitutional law, with questions of fact being reviewed for clear error and questions of law being reviewed de novo. *In re Mota*, 334 Mich App 300, 318; ___ NW2d ___ (2020). When, as here, no *Ginther*[2] hearing has been held, there are no factual findings to consider, so our review is limited to errors apparent on the record. See *People v Abcumby-Blair*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 347369); slip op at 8.

Respondents in parental-rights proceedings are entitled to effective assistance of counsel, and claims regarding ineffectiveness are reviewed under the same principles that apply to such claims in criminal proceedings. *In re Martin*, 316 Mich App 73, 85; 896 NW2d 452 (2016). Accordingly, to succeed on such a claim, a respondent must show "that (1) counsel's performance was deficient, falling below an objective standard of reasonableness, and that (2) the deficient performance prejudiced the respondent." *Id*. "To demonstrate prejudice, a party must show the existence of a reasonable probability that, but for counsel's error, the results of the proceeding would have been different, and a reasonable probability is one that is sufficient to undermine confidence in the outcome." *Mota*, 334 Mich App at 319. Counsel is presumed to be effective, and a respondent bears a heavy burden to overcome that presumption. *People v Cooper*, 309 Mich App 74, 80; 867 NW2d 452 (2015). This burden includes establishing the factual predicate for his or her claim. *Id*.

When informing the trial court that it was her understanding respondent intended to plead and make admissions to the supplemental petition, counsel for DHHS stated those admissions were "regarding failure to comply and/or benefit with the treatment plan." Respondent refers to this and points out that much of the testimony at the best-interest hearing was about how respondent had complied with her treatment plan, and argues her counsel was ineffective for advising her to plead to failing to comply with the treatment plan when respondent could have contested the matter

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

We note the respondent preserved this claim of error by moving this Court to remand for a *Ginther* hearing, but that motion was denied. We decline to revisit that motion as respondent failed to show "that development of a factual record is required for appellate consideration of the issue." MCR 7.211(C)(1)(a)(ii). Nor did she support her motion by affidavit or offer of proof. See MCR 7.211(C)(1)(a).

and succeeded. This argument is unpersuasive for a number of reasons. First, the record does not indicate that counsel advised respondent to plead to statutory grounds, so respondent has failed to establish the factual predicate for her claim. See *id*. Second, the transcript reflects that the decision to plead to statutory grounds was respondent's. Thus, even assuming counsel advised respondent to plead to statutory grounds, to establish prejudice she has to demonstrate that but for counsel's advice she would have continued with a contested hearing. Nothing in the record indicates this was the case. Indeed, respondent stated quite clearly when she entered her plea: "Yes, there's grounds [to terminate parental rights]. I messed up, but I'm trying now."

Finally, on the current record, respondent has not carried her burden of demonstrating counsel's advice to plead—if such advice was given and relied upon—fell below an objective standard of reasonableness. Even though the issue was no longer in dispute, much of the testimony at the best-interest hearing was also relevant to whether statutory grounds to terminate parental rights existed. Specifically, there was testimony that while respondent was mostly compliant with her case service plan, she failed to benefit from services to the point of being able to care for the minor child. See *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012) (noting the respondents "failed to demonstrate sufficient compliance with or benefit from those services specifically targeted to address the primary basis for the adjudication"). Respondent had only been substance-free for a short period of time. Respondent herself testified that her last use of a substance—other than a drink of alcohol after her mother died in September 2020—was in November 2019. The supplemental petition was filed on March 5, 2020, respondent pleaded to statutory grounds on December 10, 2020, and the trial court terminated respondent's parental rights on February 23, 2021. In light of the length of respondent's substance abuse, which was at least long enough that she had not provided care for her other four children, this is a fairly negligible period of time to demonstrate benefit from the services. In addition, she had no source of income and her housing was with her fiancé who DHHS could not approve for placement because of his criminal history. Indeed, respondent testified that if she could live with her fiancé and have the minor child returned, she would have needed six more months to be ready for the minor child. If she had to find another place to live, respondent testified she would need another year. And this was after the minor child had been in a relative placement for over three years—her entire life less two months in the hospital being treated for symptoms of drug withdrawal. In light of this evidence that was presumably available to respondent's counsel, it is reasonably likely that counsel viewed respondent's odds of success on statutory grounds as slim, and that respondent conceding the issue may have weighed favorably with the trial court when it assessed best interests. This was not an unreasonable strategy under the circumstances. Accordingly, respondent has failed to demonstrate counsel performed deficiently.

IV. BEST INTERESTS

Respondent argues the trial court erred by finding termination to be in the minor child's best interests because the court refused to consider respondent's compliance with her case service plan, impermissibly relied upon a report by the Clinic for Child Study, and failed to consider a guardianship in lieu of termination. We disagree.

We review a trial court's determination regarding best interests for clear error. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). A trial court's factual findings are clearly

erroneous if a reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*. at 709-710.

Once a trial court finds statutory grounds to terminate parental rights, it must consider whether termination is in the best interests of the child by a preponderance of the evidence. *Id*. at 713. "The trial court should weigh all the evidence available to determine the child[]'s best interests." *Id*. The court should consider a variety of factors, such as the child's bond to the parent, the possibility of adoption, the parent's compliance with the case service plan, and the child's need for permanency, stability, and finality. *Id*. at 713-714 (citation omitted). Other factors that may be considered include the length of time the child has been in foster care, the child's well-being while in care, and the likelihood the child could be returned to the parent's home in the foreseeable future. *In re Keillor*, 325 Mich App 80, 93; 923 NW2d 617 (2018) (citation omitted). A child's placement with a relative, which weighs against termination, must be explicitly considered by the trial court. *In re Olive/Metts*, 297 Mich App 35, 43; 823 NW2d 144 (2012).

The minor child was born in late 2017 and, after two months of hospitalization to treat symptoms of drug withdrawal, was placed with her paternal grandmother, CP. The child remained in CP's care at least until respondent's parental rights were terminated three years later. Thus, respondent has never provided care for the minor child, nor has she cared for her other four children. In fact, under a guardianship, CP also provided care for the child's elder sister. CP was willing to adopt the minor child. While in care, respondent was able to visit the child once a week, supervised by DHHS or its designee. Respondent visited consistently once she was released from eight months of incarceration in July 2020, but her visitation was much less consistent before her incarceration, generally only taking advantage of half her offered visits. While the minor child referred to respondent as "mom," she did not look to respondent for support or comfort.

Nevertheless, respondent made significant advances toward treating her substance abuse. Indeed, she completed an inpatient treatment program and moved into an outpatient program. But she was then incarcerated for violating probation—which she was on for conspiracy to sell heroin—by smoking marijuana and failing to report to her probation officer for several months. When she was released, she again began treating her substance abuse, as well as some mental health issues, from a probation-ordered halfway house. In the midst of the best interest hearings, respondent was permitted to leave the halfway house, and she moved into a home with her fiancé. Unfortunately, DHHS could not approve the home for the minor child because of the fiancé's criminal history.

The trial court found termination of respondent's parental rights to be in the minor child's best interests. The trial court noted that respondent made great efforts toward complying with her treatment plan, but found more significant the bond the minor child had with CP and her elder sister, and the permanency offered by adoption. The court explicitly considered that the minor child was placed with a relative, but nevertheless found termination to be in her best interests. In light of the evidence presented, the trial court did not clearly err. The minor child has known no caregiver other than CP for her entire life. After such a long period in foster care, it was not clearly erroneous for the court to refuse to give respondent another 6 or 12 months and instead give the minor child some permanency, stability, and finality with her grandmother and sister. For the same reason, the trial court did not err by excluding consideration of a guardianship in lieu of

termination.[3] While respondent argues the trial court impermissibly relied on a report by the Clinic for Child Study in reaching its conclusion, there is no support for this in the record. The court never mentioned the report in its findings, instead focusing on the evidence adduced during the hearing. Further, contrary to respondent's assertions, the court did consider her compliance with the case service plan and her placement with a relative, it simply found the need for permanency to outweigh those considerations. It was not clearly erroneous to do so.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola

[3] Respondent relies on *In re Affleck/Kutzleb/Simpson*, 505 Mich 858; 935 NW2d 316 (2019), to suggest the trial court erred by not considering a guardianship. In *Affleck*, our Supreme Court vacated this Court's decision and remanded to the trial court in lieu of granting leave "for reconsideration of whether terminating respondent's parental rights is in the best interests of each child." *Id.* The Court noted: "Petitioner did not consider recommending a guardianship for [the minor children] with respondent's mother because of a purported departmental policy against recommending guardianship for children under the age of 10. Absent contrary statutory language, such a generalized policy is inappropriate." *Id.* Thus, it was a generalized policy against guardianships that was at issue in *Affleck*, and there is nothing in the record to suggest such was relied upon in this case. To be sure, an explicit finding by the trial court would have been helpful. But the court could not have possibly failed to consider a guardianship in light of extensive testimony that respondent's other children were being cared for under guardianships, including one by CP. Given the court's findings, it is clear the court simply did not believe a guardianship was appropriate in light of the length of time the minor child was in care and respondent's significant history of substance abuse.