

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
February 14, 2013

In the Matter of A. E. STEJAKOWSKI, Minor.

No. 311191
Oakland Circuit Court
Family Division
LC No. 11-789960-NA

Before: MURPHY, C.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(g) (failure to provide proper care or custody) and (j) (reasonable likelihood of harm if child is returned to respondent's care). Because the trial court did not clearly err by determining that termination of respondent's parental rights was in the child's best interests and respondent was not denied the effective assistance of counsel, we affirm.

Respondent does not challenge on appeal the statutory bases for terminating his parental rights. Rather, he entered a no contest plea to the statutory grounds for termination. Respondent argues that the trial court erred by determining that termination of his parental rights was in the child's best interests and that he was denied the effective assistance of counsel. Once the petitioner has established a statutory basis for termination, the trial court must order termination of parental rights if the court concludes that termination is in the child's best interests. MCL 712A.19b(5); *In re Beck*, 488 Mich 6, 11; 793 NW2d 562 (2010). "That determination is to be made on the basis of the evidence on the whole record and is reviewed for clear error." *In re LE*, 278 Mich 1, 25; 747 NW2d 883 (2008).

Respondent was convicted of assault with intent to do great bodily harm less than murder and will be incarcerated until at least October 2023. He has an extensive criminal and domestic violence history. The child was present in the home when defendant committed the offense for which he is now incarcerated and has expressed fear of respondent and of being returned to his care. Accordingly, the trial court did not clearly err by determining that termination of respondent's parental rights was in the child's best interests.

Respondent argues that the trial court erred by admitting hearsay statements into evidence at the best-interest hearing. His argument is without merit. During the dispositional phase of a child protective proceeding, all relevant and material evidence, including hearsay, is admissible. See MCR 3.977(H)(2); *In re Gilliam*, 241 Mich App 133, 137; 613 NW2d 748 (2000). In this

case, jurisdiction was established after respondent entered a no-contest plea, and the best-interest hearing was part of the dispositional phase of the proceeding, where hearsay is admissible. Thus, the trial court was not limited to relying only on legally admissible evidence when deciding whether termination was in the child's best interests. MCR 3.973(E). Pursuant to MCR 3.973(E)(2), the trial court was permitted to rely on all relevant and material evidence to the extent of its probative value during the dispositional phase of the proceeding. Thus, the trial court did not err by relying on the hearsay evidence and, contrary to respondent's argument, his due process rights were not violated.

Respondent also challenges the lack of expert testimony. He argues that the caseworkers' statements about the child were secondhand statements and that there was no testimony regarding a psychological evaluation of the child. Respondent's argument is not persuasive. He fails to explain how expert testimony or a psychological evaluation would have undermined the trial court's best-interest findings given his criminal history, incarceration, and the child's fear of him. Thus, he has failed to show how a psychological evaluation would have affected the trial court's best-interest determination.

Respondent next argues that he was denied the effective assistance of counsel. In reviewing a claim of ineffective assistance of counsel in a termination of parental rights case, this Court applies the principles of ineffective assistance of counsel as developed in the criminal law context. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). Thus, the respondent must show that (1) counsel's performance was objectively unreasonable, and (2) the respondent was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). To demonstrate prejudice, the respondent must show that there exists a reasonable probability of a different result but for counsel's error. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). This Court does not question whether, in retrospect, counsel's advice was right or wrong, but whether the advice was within the range of competence required of attorneys and whether counsel was functioning as an attorney guaranteed under the Sixth Amendment of the United States Constitution. *People v Thew*, 201 Mich App 78, 89; 506 NW2d 547 (1993).

Respondent contends that his counsel was ineffective for failing to object to hearsay evidence that was irrelevant and immaterial to the child's best interests. He argues that the focus of the best-interest hearing was on the child's deceased mother and her drug screens and that witnesses were called to testify regarding respondent's fitness to parent even though that is not the standard in a best-interest hearing. Contrary to respondent's claim, the testimony did not focus on the child's deceased mother. Moreover, respondent's fitness to parent was relevant to whether reunification was in the child's best interests. Thus, respondent fails to demonstrate how the evidence was irrelevant to the child's best interests.

Respondent also argues that his counsel was ineffective because he failed to object to leading questions and effectively question witnesses. As previously discussed, the rules of evidence do not apply in best-interest hearings. MCR 3.973(E); MCR 3.975(E). Moreover, leading questions are proper on cross-examination. Respondent fails to explain how counsel failed to question the witnesses effectively. In any event, counsel's decision regarding which questions to ask is a matter of trial strategy, and this Court will not substitute its judgment for that of counsel's on matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649

NW2d 94 (2002). Because respondent has not established that the result of the proceeding would have been different if counsel had examined the witnesses more effectively, he has failed to demonstrate the requisite prejudice.

Respondent also argues that counsel rendered ineffective assistance because instructing respondent to enter a no-contest plea allowed the transcript of respondent's preliminary examination in his criminal case to be used as a factual basis to support the plea. Respondent fails to demonstrate how counsel's advice was erroneous or how he would have acted differently if given different advice. The primary witness who testified at the preliminary examination was defendant's girlfriend who was the subject of the assault for which defendant was convicted and incarcerated. If respondent objected to the admission of the preliminary examination testimony, he could have elected to proceed to trial and the girlfriend's testimony would have been admitted, in some form, in any event. Thus, respondent has failed to show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's performance. *Mitchell*, 454 Mich at 164.

Affirmed.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher