STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of P.F., Minor.

UNPUBLISHED
December 3, 2013

No. 315280
Wayne Circuit Court
Family Division
LC No. 12-509859-NA

Before: FORT HOOD, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Respondent appeals the trial court order that terminated her parental rights to the minor child, P.F., pursuant to MCL 712A.19b(g), and (j). For the reasons stated below, we affirm.

Respondent makes four arguments as to why the trial court order should be reversed: (1) her due process rights were violated because petitioner failed to provide her with proper notice of the allegations of water intoxication; (2) her attorney provided her with ineffective assistance of counsel at the termination hearing; (3) there was not clear and convincing evidence that statutory grounds for termination existed; (4) the trial court erred in finding termination was in the child's best interest. None of these claims is convincing, and we address each in turn.

I. DUE PROCESS

This Court reviews unpreserved constitutional issues for plain error affecting substantial rights. *Bay County Prosecutor v Nugent*, 276 Mich App 183, 193; 740 NW2d 678 (2007).

> Procedural due process limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by due process, such as life, liberty, or property. A procedural due process analysis requires a court to consider (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient. [*In re VanDalen*, 293 Mich App 120, 132; 809 NW2d 412 (2011) (internal citations and quotation marks omitted).]

"A natural parent has a fundamental liberty interest 'in the care, custody, and management' of his child . . . ." *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). "The fundamental requisite of due process of law is the opportunity to be heard." *Id.* at 92 (internal citations and quotation marks omitted). "The 'opportunity to be heard' includes the right to notice of that opportunity." *Id.* (Internal citations and quotation marks omitted.) The notice must be

"reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* (Internal citations and quotation marks omitted.) The state violates a respondent's right to procedural due process when it fails to provide the respondent with "sufficient information to meaningfully participate—or to decline to participate—in the . . . proceedings." *Id.* at 119. MCR 3.961(B)(3) provides that the petition must contain, "[t]he essential facts that constitute an offense against the child . . . ."

Here, petitioner provided respondent with constitutionally sufficient notice of the allegations. Respondent had access to the medical records used by petitioner at the termination hearing—before the termination hearing took place. The medical records indicate that P.F. was "profoundly hyponatremic," and mention hyponatremia on multiple other occasions.[1] They also indicate that several of the treating doctors believed that P.F. suffered from water intoxication. P.F.'s large amount of diluted urine supported this diagnosis. Another treating doctor wrote, "I suspect the hyponatremia is from water intoxication from inappropriately mixed formula." And the petition itself stated that P.F.'s sodium levels were low and that she suffered from seizures. As such, the petition contained "[t]he essential facts that constitute[d the] offense" as required by MCR 3.961(B)(3). The medical records and the petition together were more than "sufficient information" to allow respondent to "meaningfully participate" in the termination hearing. *Rood*, 483 Mich at 119.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

"In analyzing claims of ineffective assistance of counsel at termination hearings, this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context." *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). Respondent did not move for a new hearing or a *Ginther*[2] hearing. This Court's review is accordingly "limited to mistakes apparent on the record." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). "The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). This Court reviews the trial court's factual findings for clear error, and its constitutional determination de novo. *Id.*

"This Court has explicitly recognized that the United States Constitution guarantees a right to counsel in parental rights termination cases." *In re Williams*, 286 Mich App 253, 275; 779 NW2d 286 (2009). See also MCL 712A.17c(4) and MCR 3.971(B)(2) (providing that a court must advise a respondent of her right to an attorney). "To prevail on this claim of ineffective assistance of counsel, [a respondent] must show that her trial counsel's performance was deficient, i.e., she must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced her that it denied her a fair trial." *In re*

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[1] The relevant portion states, "[s]he apparently was also having some seizure-like symptoms at home. According to the mom, she was taken to Annapolis Hospital, was found to profoundly hyponatremic. She has sodium of 121."

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

CR, 250 Mich App 185, 198; 646 NW2d 506 (2001) (internal citations and quotation marks omitted). Cross-examination of "[a] witness [is] presumed to be [a] matter[] of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). "There is . . . a strong presumption of effective [assistance of] counsel when it comes to issues of trial strategy" because "many calculated risks may be necessary in order to win difficult cases." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court will not "second-guess matters of strategy or use the benefit of hindsight" to evaluate defense counsel's performance. *Id.*

In this case, respondent's counsel's performance did not fall below an objective standard of reasonableness. His decision not to object to the water intoxication testimony had merit. Counsel is not required to raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). As explained above, respondent had constitutionally sufficient notice of the allegation of water intoxication, and therefore, any objection would have been futile.

In any event, respondent's counsel's decision to avoid a detailed discussion of water intoxication was a matter of trial strategy, and did not prejudice respondent. Respondent argues that the water intoxication and a developmental deviation could have explained the suture and lung injuries. In fact, neither explains P.F.'s lung injury. Dr. Mary Lu Angelili testified that a trauma to the chest area caused the blood in P.F.'s lung, and that P.F. was not more susceptible to the injuries than any other infant. Therefore, respondent's counsel's decision to argue that the fall caused all three trauma injuries and avoid the water intoxication issue was likely a matter of trial strategy. And even if trial counsel had questioned Dr. Angelili about the effects of water intoxication, doing so would not have explained the severe trauma injury to P.F.'s chest that caused her lung to fill with blood.

III. STATUTORY GROUNDS FOR TERMINATION

This Court reviews the trial court's "decision that a ground for termination has been proven by clear and convincing evidence" for clear error. *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012) (internal citations and quotation marks omitted). The trial court's findings are only set aside if the appellate court "is left with the definite and firm conviction that a mistake has been made." *Id.* at 41 (internal quotation marks omitted).

"The existence of a statutory ground for termination of parental rights must be proven by clear and convincing evidence." *In re LE*, 278 Mich App 1, 26; 747 NW2d 883 (2008), citing MCR 3.977(F)(1)(b) and MCL 712A.19b(1).

> [Clear and convincing evidence] must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009) (internal quotation marks omitted).]

MCL 712A.19b(3) provides, in relevant part:

The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(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.

(*ii*) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(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 capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

(*iii*) Battering, torture, or other severe physical abuse.

(*iv*) Loss or serious impairment of an organ or limb.

(*v*) Life-threatening injury.

"The petitioner bears the burden of establishing the existence of at least one . . . ground[] by clear and convincing evidence." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003).

A. CAUSATION

There was clear and convincing evidence that respondent caused P.F.'s injuries, pursuant to MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (j), (k)(*iii*), (k)(*iv*), and (k)(*v*). Petitioner did not have to prove that respondent caused the injuries directly. "[T]ermination of parental rights under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (j), and (k) [] is permissible even in the absence of definitive evidence regarding the identity of the perpetrator when the evidence does show that the respondent or respondents must have either caused or failed to prevent the child's injuries." *In re Ellis*, 294 Mich App 30, 35-36; 817 NW2d 111 (2011). Respondent and P.F.'s grandmother lived with P.F. and were her only caretakers. Therefore, respondent either caused or failed to prevent P.F.'s injuries.

B. ABUSE

There was clear and convincing evidence that P.F.'s injuries resulted from abuse, as opposed to accident, pursuant to MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (j), (k)(*iii*), (k)(*iv*), and (k)(*v*). MCL 712A.1 *et seq.* does not define the term "abuse." However, MCL 722.602 defines child abuse as "harm or threatened harm to a child's health or welfare by a person responsible for the child's health or welfare, which harm occurs or is threatened through nonaccidental physical or mental injury." Dr. Angelili testified that in her opinion, the trauma injuries were intentionally caused, because of the location, number, severity and unexplained nature of the injuries. Respondent's explanation, at best, accounts only for P.F.'s head injuries. Furthermore, although Dr. Angelili could not testify to a pattern of abuse by determining the age of the injuries, the unexplained and severe trauma to P.F.'s lung combined with the two head injuries was strong circumstantial evidence that the injuries were not accidental.

There was clear and convincing evidence that the abuse was severe physical abuse, as required by MCL 712A.19b(3)(k)(*iii*). Dr. Angelili stated that the head injuries were moderately severe, and P.F. continues to be monitored for brain damage. A blow to the side of the chest caused P.F.'s lung injury. It was severe and resulted in a significant amount of blood collecting in her lung. MCL 712A.19b(3)(k) requires that only one of the subsections be met in order to terminate. Therefore, the trial court did not clearly err when it found clear and convincing evidence to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(b), (j), and (k).

D. FUTURE CARE

There is clear and convincing evidence that respondent could not properly care for P.F. in the future, pursuant to MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), and (j). P.F. suffered from unexplained injuries while living with, and being taken care of by respondent and the grandmother. Respondent failed to acknowledge the nature and severity of P.F.'s injuries. She testified that she would continue to allow the grandmother to care for P.F. in the future, because she believed that the injuries were an accident. Therefore, there is a reasonable likelihood that P.F. would be harmed or abused if placed back in respondent and grandmother's home.

IV. BEST INTERESTS OF THE CHILD

This Court reviews the trial court's best interest determination for clear error. *Olive/Metts*, 297 Mich App at 40. The trial court's findings are set aside only if the appellate court "is left with the definite and firm conviction that a mistake has been made." *Id*. at 41.

Once the petitioner presents clear and convincing evidence of a statutory ground for termination, it must then prove by a preponderance of the evidence that termination is in the child's best interests. *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). "'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.'" *Olive/Metts*, 297 Mich App at 42, quoting MCL 712A.19b(5).

To determine a child's best interests, a trial court may consider the respondent's bond with the child, parenting ability, and "the child's need for permanency, stability, and finality." *Olive/Metts*, 297 Mich App at 42. A trial court also must "explicitly address whether termination is appropriate in light of the child[]'s placement with relatives." *Id* at 43. "'[A] child's placement with relatives weighs against termination under MCL 712A.19a(6)(a),'" *Olive/Metts*, 297 Mich App at 43, quoting *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010). If the trial court fails to explicitly address placement with a relative, the record is "inadequate to make a best-interest determination and requires reversal." *Olive/Metts*, 297 Mich App at 43, citing *Mason*, 486 Mich 163–165; see also *In re Mays*, 490 Mich 993, 994; 807 NW2d 307 (2012).

The trial court properly addressed P.F.'s placement with respondent's maternal cousin as a factor weighing against termination. The trial court acknowledged that the cousin was willing to care for P.F., and that she did not believe that respondent's parental rights should be terminated. Nor did the trial court clearly err when it chose to give this recommendation little weight. As respondent's cousin, she is potentially biased in favor of respondent. And there is no indication that respondent's maternal cousin has any medical or other expertise in this area.

Although there is evidence of a bond between respondent and P.F., there is substantial evidence that respondent lacks the parenting skills to properly take care of P.F. and prevent injury in the future. Respondent failed to acknowledge the nature and severity of P.F.'s injuries. She also testified that she would continue to allow the grandmother to care for P.F. in the future, because she believed that the injuries were an accident—despite evidence to the contrary.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Stephen L. Borrello