If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

In re BELL, Minors.

UNPUBLISHED
March 18, 2021

No. 353001
Wayne Circuit Court
Family Division
LC No. 2019-001761-NA

Before: STEPHENS, P.J., and K. F. KELLY and RIORDAN, JJ.

PER CURIAM.

Respondent father appeals as of right the trial court order terminating his parental rights to the minor children, TMB and TJB, under MCL 712A.19b(3)(a)(*ii*), (b)(*i*), (g), (j), (k)(*ii*), and (k)(*xi*). Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

Petitioner, the Department of Health and Human Services (DHHS), received a complaint from the children's maternal grandmother in March 2019, that the children lived in an unsuitable home. The children's mother remedied the situation by moving to a different residence. However, during the course of the investigation, TMB revealed that when respondent lived with the children and their mother in 2017, he abused both children. After the abuse occurred in 2017, TMB disregarded respondent's instructions to keep his conduct a "secret" and disclosed the incidents to her mother, and her mother made respondent leave the home.

After the abuse disclosure in 2019, a Child Protective Services (CPS) investigator spoke with respondent. Respondent admitted that he had not had contact with the children or provided any monetary or other support since 2017, but denied the allegations of abuse. However, Stephanie Green, a forensic interviewer with Kids-TALK, spoke with TMB. At that time, TMB disclosed two incidents of abuse that occurred in 2017, when she was six years old. Although TMB did not identify specific body parts by name, her use of slang terms, physical description, and gestures indicated knowledge beyond her years. The DHHS then filed a petition to take jurisdiction over the children with respect to respondent and for termination of his parental rights.

At the hearing on the petition, the trial court found by a preponderance of the evidence that the children came within the jurisdiction of the court under MCL 712A.2(b)(1) and (2),

abandonment and sexual abuse. Following a tender years' motion and a review of the Kids-TALK interview, the trial court granted the request to admit Green's testimony addressing TMB's disclosure of abuse. The court also found that there was clear and convincing evidence to support termination of parental rights under MCL 712A.19b(3)(a)(*ii*), (b)(*i*), (g), (j), (k)(*ii*), and (k)(*ix*). The court ordered respondent to participate in a Clinic for Child Study evaluation before the best interests' hearing.

When the bifurcated proceeding resumed, the Clinic for Child Study report was admitted into evidence. During his interview, respondent claimed that he suffered from posttraumatic stress disorder after he was hit by a pickup truck when crossing the street in 2017. He was unemployed and homeless, but was recently allowed to stay with his mother while he attempted to find stable housing and employment. Respondent denied that he abused his children. Rather, he claimed that the children's mother frequently brought other men into her home and attributed the children's identification of him as the perpetrator to a "mix up." The report recommended termination of respondent's parental rights.

Ultimately, the trial court found that termination of respondent's parental rights was in the best interests of the children. In particular, it noted the nature and severity of the abuse, found that respondent presented a danger to the children, and that termination of his parental rights was the best remedy to protect the children.

II. STATUTORY GROUNDS

On appeal, respondent first asserts that the trial court clearly erred in finding clear and convincing evidence to support the statutory grounds for termination of respondent's parental rights. 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 3.977(K). The petitioner must prove at least one ground for termination. *In re Trejo*, 462 Mich 341, 351; 612 NW2d 407 (2000). "Only one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights, even if the court erroneously found sufficient evidence under other statutory grounds." *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011).

MCL 712A.19b(3)(a)(*ii*) provides for termination of parental rights when the "child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period." Respondent admitted, and the evidence showed, that he did not have contact with his children after 2017, had not made any attempt to maintain contact with them, and had not contributed to their support in any way. Thus, there was clear and convincing evidence to support the court's finding that respondent had deserted his children for 91 or more days and had not sought custody during that period. MCL 712A.19b(3)(a)(*ii*). Since there was no error in this

determination, we need not address whether the trial court otherwise erred in finding that the other statutory grounds were established. *In re Ellis*, 294 Mich App at 32.[1]

III. BEST INTERESTS

Next, respondent contends that the trial court clearly erred in finding by a preponderance of the evidence that termination of his parental rights was in the best interests of the children. We disagree.

Once a statutory ground for termination has been established, the trial court must conclude that termination of parental rights is in the child's best interests before it can terminate parental rights. MCL 712A.19b(5); *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). 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).

"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). "In deciding whether termination is in the child's best interests, the court may consider 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 at 41-42 (citations omitted). "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014).

The trial court did not clearly err in concluding that termination of respondent's parental rights was in the children's best interests. The trial court concluded that the nature and severity of the sexual abuse, respondent's denial and blaming of others, and his abandonment of his children by failing to provide care, support, or to even visit demonstrated that he presented a danger to his children and that termination of his parental rights was in their best interests. The evidence supported the court's finding that respondent had abused and abandoned his children. He made no attempt to provide for their mental or physical well-being. He failed to take any responsibility for, and continued to deny, any involvement in the abuse. The children needed permanency, stability, and safety. Thus, we conclude that the trial court did not clearly err in finding by a preponderance of the evidence that termination of respondent's parental rights was clearly in the best interests of the children.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

---

[1] Although only one statutory ground for termination of parental rights is necessary, after our review of the record, the trial court also did not clearly err in concluding that MCL 712A.19b(3)(b)(*i*) and (k)(*ii*) were satisfied with clear and convincing evidence. Termination is also supported on these additional statutory grounds.

Lastly, respondent contends that he was denied the effective assistance of counsel. We disagree.

The principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). In order to prove a case of ineffective assistance of counsel, a defendant must establish that (1) trial counsel's performance was objectively deficient, and (2) that the deficiencies prejudiced the defendant. *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018), citing *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Randolph*, 502 Mich at 9, citing *Strickland*, 466 US at 694. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Decisions regarding the evidence to be presented and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Meissner*, 294 Mich App 438, 460; 812 NW2d 37 (2011). Furthermore, decisions regarding whether to present an opening statement, the focus of closing argument, and the failure to object to evidence, procedure, or argument can be classified as sound trial strategy. See *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008). Finally, in order to receive a new trial on the basis of ineffective assistance of counsel, a respondent must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 US at 690.

First, respondent alleges that counsel provided ineffective assistance by failing to object to the admission of the forensic interview DVD and by advising the trial court that there was no evidence to contradict TMB's claims of abuse when respondent had denied the allegations. Respondent relies on *People v Fisher*, 119 Mich App 445; 326 NW2d 537 (1982), for the proposition that an attorney should not make a concession contrary to a client's position.

Respondent's reliance on *Fisher* is misplaced. In the present case, all parties, and the court, had previously viewed the DVD of the forensic interview. The interviewer was an expert with years of experience and had conducted over 700 forensic interviews. Thus, the trial court found by a preponderance of the evidence that the totality of the circumstances surrounding the interview provided "an adequate indicia of trustworthiness." The court also considered that TMB had indicated that she knew the difference between the truth and a lie and that she would only say things that were truthful. The court found that there was "a free narrative," that TMB's statements were "spontaneous and consistent," that her mental state appeared to be fine, and that there was no evidence of coaching or fabrication. Regardless of the content of the DVD, counsel apprised the trial court that respondent denied committing sexual abuse. Furthermore, in light of the expert witness testimony and the findings of the trial court, respondent cannot demonstrate that an objection to the admission of the DVD on any basis would have precluded its admission into evidence.

Respondent also alleges that trial counsel should have challenged TMB's credibility by questioning Green regarding the child's knowledge of the consequences of lying and anatomy in light of her use of slang terms. However, respondent has not offered any suggestion of proof what

the answers to those questions would have been or demonstrated any reasonable probability that the answers would have resulted in testimony that would have convinced the trial court not to terminate his parental rights. *In re CR*, 250 Mich App 185, 198-199; 646 NW2d 506 (2002) overruled on other grounds *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014). In fact, quite the opposite is true. Defense counsel did question the forensic interviewer regarding whether TMB had changed her story and whether her demeanor appeared to be honest and truthful. The answers were not helpful to respondent's case. Respondent also contends that trial counsel should have called TMB's mother as a witness to testify about what TMB had reported to her. However, again, respondent failed to present any evidence that, had his attorney called TMB's mother to testify, there was a reasonable probability that she would have given evidence that would have changed the outcome of this case.

Respondent's attorney was hampered by the overwhelming evidence against respondent and the lack of any evidence supporting respondent's position. TMB's recitation of what happened to her was consistent for over two years. The evidence showed that she had reported the incidents of abuse to her mother, who immediately removed respondent from the home. The forensic interview was performed by an expert in the field. The court found that the totality of the circumstances showed that TMB's recitation was trustworthy. The evidence further showed that respondent had abandoned his children and had not provided any financial or emotional support for at least two years. Respondent refused to acknowledge his actions and tried to blame others. A review of the record does not reveal "any obvious errors." *In re CR*, 250 Mich App at 199. Counsel cannot be considered ineffective if counsel's assistance was reasonable considering all the circumstances. *People v Rhinehart*, 149 Mich App 172, 174; 385 NW2d 640 (1986), citing *Strickland*, 466 US 668. Respondent failed to provide any support for a finding that if his attorney had asked additional questions, or objected to the admission of the DVD, or called the mother as a witness, there was a reasonable probability that the result of the proceedings would have been different. *Randolph*, 502 Mich at 9, citing *Strickland*, 466 US at 694. Thus, we conclude that respondent failed to demonstrate that he was denied the effective assistance of counsel.

Finally, respondent submits that the trial court erred by failing to remove his attorney on the basis of gross incompetence. We find no merit to this argument. Removal of a respondent's attorney may be justified by gross incompetence, physical incapacity, or contumacious conduct. *People v Arquette*, 202 Mich App 227, 231; 507 NW2d 824 (1993). However, the record must support such a finding. *Id*. at 232. Our review of the record discloses no instances of gross incompetence by respondent's attorney that would have justified his removal by the trial court.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Kirsten Frank Kelly
/s/ Michael J. Riordan