

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
April 17, 2012

In the Matter of O. HUNT, Minor.

No. 306166
Wayne Circuit Court
Family Division
LC No. 98-369173-NA

Before: M. J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating her parental rights to the minor child under MCL 712A.19b(3)(g), (i), and (j). We affirm.

Respondent first argues that the trial court clearly erred in its factual findings. In termination proceedings, this Court must defer to the trial court's factual findings if those findings do not constitute clear error. MCR 3.977(K). "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 Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

The trial court found that respondent's parental rights were previously terminated to four children, that respondent was offered a treatment plan in each case, that all of these terminations were attributable to respondent's use of illegal drugs, and that respondent tested positive for cocaine during the birth of her previous four children. The evidence at the combined adjudication trial and termination hearing, however, established that one of the four children was born testing positive for cocaine, that respondent was offered a treatment plan in that case, and that respondent admitted that the four terminations were due to her substance abuse. The lower court record concerning the other children, which the trial court properly considered, *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973), established that all four children had tested positive for drugs at birth, but that respondent had been offered a treatment plan in only one case and her rights to the other three children were terminated pursuant to initial petitions. Although these and other factual findings made by the referee were not supported by the record, the errors were harmless. Respondent did not contest jurisdiction, and clear and convincing evidence established the prior terminations attributable to respondent's substance abuse, that she had been provided with at least one treatment plan, and that she continued to abuse substances.

Respondent argues that the trial court clearly erred in finding that the statutory grounds for termination were established by clear and convincing evidence. However, respondent's

counsel conceded that at least one statutory ground for termination was established by clear and convincing evidence in her closing argument. Because respondent mother conceded the issue, she cannot now raise the issue on appeal as error. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). However, we will address the issue because it is the crux of respondent mother's ineffective assistance of counsel issue.

Both the trial court's decision that a ground for termination has been proven by clear and convincing evidence and the best-interest determination are reviewed for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). Here, respondent admitted that her parental rights to four children were previously terminated and that the reason for the terminations was her drug use. The trial court did not clearly err in finding that section (i) was established by clear and convincing evidence. Our review of the lower court file revealed that a prior attempt at rehabilitation was unsuccessful and that all four of her children were born testing positive for drugs. Although respondent argues that the past neglect was not serious or that being born testing positive for drugs was not physical abuse because the children did not suffer withdrawal symptoms, the court file indicated that one of the four older children was born addicted to cocaine, indicating that he did suffer withdrawal symptoms. Therefore, the trial court did not clearly err in finding that section (i) was established by clear and convincing evidence. Even if the trial court had clearly erred in finding that section (i) was established by clear and convincing evidence, the error would be harmless where section (l) was established by clear and convincing evidence. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). Respondent testified that her parental rights to four other children were terminated and the court file confirms that the terminations were under MCL 712A.19b.

Because only one statutory ground for termination need be established by clear and convincing evidence to support termination, we decline to address the trial court's findings that sections (g) and (j) were established. MCL 712A.19b(3). We note that our conclusion that sections (i) and (l) were established is not based upon the trial court's incorrect factual findings.

Respondent next argues that the trial court clearly erred in its best-interest determination. MCL 712A.19b(5). We find no clear error. Respondent's parental rights to four other children were terminated in 2000, 2001, 2003, and 2007 due to drug use, she was convicted of drug possession in 2010, and she had been in drug treatment five times. Although there was no evidence that she neglected or abused the child, respondent's history of parenting and drug use can only foretell future neglect of this child. The trial court did not clearly err in finding that termination of respondent's parental rights was in the child's best interests.

Finally, respondent argues that her due process rights were violated because of the ineffectiveness of her trial counsel. In analyzing a claim of ineffective assistance of counsel where a respondent does not move for an evidentiary hearing or new trial, this Court's review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995), lv den 449 Mich 893 (1995).

The due process clauses of both the Michigan and the United States Constitutions guarantee indigent parents the right to counsel where their parental rights may be terminated. US Const, Am IV; Const 1963, art 1, § 17. The right to counsel includes the right to effective assistance of counsel. Effective assistance of counsel claims in parental rights termination cases

are analogous to effective assistance of counsel claims in criminal cases. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). Effective assistance of counsel is presumed and a respondent bears a heavy burden of establishing otherwise. To establish ineffective assistance of counsel, a respondent must show (1) that counsel's failure fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceedings was fundamentally unfair or unreliable. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995).

Respondent first argues that her counsel was ineffective for failing to object to hearsay evidence by the Children's Protective Services supervisor. Even assuming the evidence was inadmissible, any error in its admission was harmless as MCL 712A.19b(i) and (l) were established by respondent's own testimony and the court file. Therefore, the hearsay evidence was not necessary to establish the statutory grounds for termination, and respondent was not prejudiced by its admission.

Next, respondent argues that her trial counsel was ineffective for agreeing to jurisdiction and for conceding that at least one ground for termination was established. As previously noted, however, at least one statutory ground for termination was established by the previous termination and counsel's decision to concede that at least one ground for termination was established was likely a matter of trial strategy. This Court does not substitute its judgment for that of counsel's when it comes to trial strategy. *People v Kevorkian*, 248 Mich App 373, 214-215; 639 NW2d 291 (2001).

The trial court found that jurisdiction was established by a preponderance of the evidence where respondent had other children to whom her parental rights had been terminated, had a chronic substance abuse history for which treatment had been unsuccessful, and had previously failed to complete a parent-agency agreement. Although the trial court made errors in its findings of fact, the court did not clearly err by finding, based on the other evidence, that jurisdiction had been established by a preponderance of the evidence. Therefore, even if counsel erred by conceding jurisdiction, respondent mother was not prejudiced because the trial court correctly found jurisdiction without considering trial counsel's concession.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio