

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
April 11, 2013

In the Matter of VANALSTINE, Minors.

No. 312858
Mecosta Circuit Court
Family Division
LC No. 11-005747-NA

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Respondent mother appeals by right from the order terminating her parental rights to her minor children, M and B, under MCL 712A.19b(3)(b)(ii), (c)(i) (g), and (j). We affirm.

On August 23, 2011, the Department of Human Services (DHS) petitioned the trial court to remove the children from respondent's care. The initial petition alleged several grounds for removal and sought immediate termination of respondent's parental rights. The trial court removed the children from respondent's care and authorized the petition. The trial court then ordered the parties to participate in facilitative mediation, which resulted in a mediation agreement that provided as follows:

We, the undersigned, having participated in a mediation session on 10/21/11 and being satisfied that the provisions of the resolution of our dispute are fair and reasonable, do hereby agree to abide by and fulfill the following contract:

[Respondent] will admit to allegations 1-4, 8 as amended, 9 as amended, 10, 11, 13 as amended, 14, [and] 15 of the amended petition for the purposes of providing the court jurisdiction.

Prosecuter [sic] has agreed to not act on termination for 6 months commencing 10/21/11. This agreement is conditional on no future allegations of abuse or neglect that are substantiated. To avoid termination beyond the six month period [respondent] will participate and benefit from the following services

1. Catholic Social Services Counseling
2. 1016 Recovery Network – Substance abuse testing, education, counseling, assessment, [and] follow their recommendation

3. Higher Ground – Life Management
4. WISE – for pattern changing and domestic violence education and awareness
5. A parenting program selected by DHS
6. Any other services recommended from the psychological evaluation

[Respondent] agrees to maintain appropriate housing for herself and two children that is safe, large enough to accommodate the family and that she is able to sustain on her own account, which may include public or familial assistance.

[Respondent] further agrees that no unrelated overnight guests will be in residence without DHS clearance.

[Respondent] will be free of drugs but for those prescribed by a licensed doctor or recommended by 1016 or the psychologist

Supervised parenting time will continue at 1 hour per week and can be increased at the discretion of the DHS. She also will avoid confusing the children into thinking they can immediately come home with her and agrees denigrate current living situation [sic].

[Respondent] further agrees to visit independently and be timely in her parenting time.

DHS will coordinate [respondent]'s parenting time with the fathers who are the current caretakers

[Respondent] agrees to abide by parenting time schedules and DHS has discretion to restrict or limit visitation based on [respondent]'s tardiness and/or inappropriateness [sic]

DHS agrees to use their best efforts to provide the services described in this agreement.

Pursuant to the mediation agreement, respondent pled to certain allegations in the petition, providing the trial court with jurisdiction over the children.

Following unsuccessful attempts at rehabilitation, petitioner again petitioned the trial court to terminate respondent's parental rights, alleging that respondent failed to compete or benefit from counseling and substance abuse treatment, failed to maintain employment and proper housing, and became pregnant with her third child despite denying involvement in sexual relationships. At the termination hearing, respondent testified that she was three months pregnant and in a relationship that she did not disclose to DHS until asked. Respondent admitted she is a drug addict but that she believed she "overcame" her addiction to Vicodin. She admitted that she tested positive for Vicodin in June 2012 after obtaining a prescription for back pain.

Respondent again claimed that she did not know how B was injured and asserted that if she had ever told DHS that her boyfriend was responsible for the injury, that statement was untrue. Respondent testified that she remembered agreeing to the terms of the mediation agreement and entering her plea and did not assert that she believed it impossible to comply with the mediation agreement.

Carey Adrianse, a CPS worker who initially investigated B's injuries, stated that respondent provided varying explanations of the origin of the injuries, namely that she fell while holding the child. However, doctors determined that "the mechanism of injury was determined to be a squeeze." She further testified that respondent's boyfriend was a registered sex offender and had his own child removed from his care on two separate occasions. Respondent told Adrianse that her boyfriend had threatened to kill her on more than one occasion and there were indications that he had been physically and verbally abusive. Nonetheless, respondent did not describe her boyfriend as abusive and expressed her desire to maintain the relationship.

The trial court found clear and convincing evidence to support terminating respondent's parental rights under MCL 712A.19b(3)(b)(ii), (c)(i), (g), and (j), and that termination was in the children's best interests.

Respondent first raises a claim that appears to be both an assertion that the mediation agreement should be declared void because it was contractually impossible to perform, as well as a challenge to the trial court's findings concerning the grounds for termination.

"This Court reviews for clear error the trial court's ruling that a statutory ground for termination has been established and its ruling that termination is in the children's best interests." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Id.*

Contrary to respondent's assertion, the trial court did not terminate respondent's parental rights solely for a technical failure to comply with the agreement. Rather, the court's decision was based on respondent's conduct throughout the proceedings, which included but was not limited to her failure to comply, and which in turn led to the trial court's assessment of the applicable statutory termination factors. Thus, we find it unnecessary to resolve whether a defense of impossibility could otherwise render such a mediation agreement void or voidable. In reviewing the entire record, we find that the trial court did not clearly err in terminating respondent's parental rights.

The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(ii), (c)(i), (g), and (j), which provide:

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:

* * *

(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.

* * *

(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.

* * *

(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.

The trial court did not clearly err in finding statutory grounds to terminate respondent's parental rights. It is undisputed that B suffered serious injuries at an early age while in respondent's care. Respondent offered various conflicting stories that described the injuries as accidental, yet none of the explanations were consistent with the medical opinion that the injuries were caused by squeezing B. Respondent has a history of entering into relationships with abusive partners. Throughout the proceedings, respondent exhibited a lack of insight into the nature of abusive relationships, failed to disclose a new relationship to DHS, and failed to understand how keeping her children around abusive men would be dangerous. At the termination hearing, respondent claimed that her boyfriend was not abusive, despite earlier describing instances where he threatened her life and was verbally and physically abusive. The evidence suggests that the boyfriend inflicted injuries to both B and respondent. The record clearly supports a finding that B was injured while in respondent's care and that respondent never provided a satisfactory explanation as to the cause of the injuries. Respondent's lack of insight into the nature of abusive relationships and her propensity to engage in relationships with abusive partners provided the trial court with ample evidence to support a finding that there was a reasonable likelihood that the children would suffer injury or abuse in the foreseeable future if

placed with respondent as well as a reasonable likelihood that the children would be harmed if returned to respondent's care.

With regard to MCL 712A.19b(3)(c)(i) and (g), the conditions that led to the adjudication were B's physical injuries, respondent's drug addiction, and respondent's abusive relationships. Respondent failed to make adequate progress toward treating her drug addiction. B was born positive for methadone and exhibited withdrawal symptoms. Respondent left inpatient treatment early against medical advice and failed to pursue a program of active recovery. Respondent did provide negative drug screens but, as the trial court noted, respondent's choice to accept a prescription for Vicodin for back pain without notifying DHS shows "a stunning lack of insight . . . into the nature of addiction" that renders long-term recovery "highly unlikely." The trial court also properly noted respondent's history of unstable housing and unemployment throughout the proceedings. Despite a year of services, respondent had been unable to maintain consistent employment, reliable housing, or make significant progress in treating her drug addiction. Respondent's refusal or inability to significantly address these issues provided the court ample basis to find that the conditions that led to the adjudication continued to exist and that respondent would be unable to provide proper care and custody of the children within a reasonable time.

Respondent next asserts that she was deprived of the effective assistance of counsel.¹ "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Id.*; See *In re CR*, 250 Mich App at 198.

Respondent has failed to show that, but for the alleged errors of her trial counsel, the outcome of the proceedings would not have resulted in termination of her parental rights. Respondent argues that, had she not entered a plea, petitioner would have been unable to obtain jurisdiction over the children. We disagree. The trial court was presented with evidence that B had been seriously injured while in respondent's care and that the children had been subjected to an environment rife with abusive, violent relationships and active drug addiction, which would have provided the court with jurisdiction pursuant to MCL 712A.2(b)(2).

Respondent's argument that trial counsel was ineffective for allowing her to enter into the mediation agreement is also without merit. Under MCR 3.977(E)(3), the trial court could have terminated respondent's parental rights at the initial adjudication based on B's injuries pursuant

¹ This Court has held that the principles of ineffective assistance of counsel developed in criminal law apply to child protective proceedings. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2001).

to MCL 712A.19b(3)(b)(ii). The original petition sought immediate termination. By entering into the mediation agreement, respondent was able to obtain DHS services and attempt to overcome the barriers to reunification. Since respondent's goal was ultimately to retain her parental rights, it is difficult to imagine how counsel's actions in furthering those goals by delaying termination proceedings and engaging DHS services in lieu of immediate termination proceedings rendered counsel ineffective.

Lastly, respondent takes issue with alleged failings in the trial court's advisement of her rights at the adjudicative phase of the proceedings. We need not address this issue as it constitutes an impermissible collateral attack on the adjudication. *In re SLH*, 277 Mich App 662, 669; 747 NW2d 547 (2008).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

/s/ Douglas B. Shapiro