

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of C. L. D., Minor.

UNPUBLISHED
June 19, 2014

Nos. 315845, 315846
Wayne Circuit Court
Family Division
LC No. 08-475662-NA

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

PER CURIAM.

Respondents (mother and father) appeal as of right the circuit court's order terminating their parental rights to their child under MCL 712A.19b(3)(a)(ii) (desertion for more than 91 days; (3)(c)(i) (failure to rectify conditions that brought the child into jurisdiction), and (g) (failure to provide proper care or custody). As against mother, the court also found statutory grounds for termination under MCL 712A.19b(3)(i) (prior termination of parental rights of a sibling due to serious and chronic neglect or abuse) and (l) (prior termination of rights to another child). As against father, the court found additional statutory grounds under MCL 712A.19b(3)(j) (likelihood of harm if returned to parent's home).

Mother also appeals the circuit court's denial of her motion for a new trial, following this Court's remand for an evidentiary hearing on the effectiveness of mother's trial counsel. We affirm the denial of the motion for a new trial. We also affirm the termination of respondents' parental rights.

I. FACTS AND PROCEDURAL HISTORY

The child in this case was born in August 2010. Shortly after the child's birth, petitioner temporarily removed the child from mother's custody and placed the child with father.¹ In February 2011, when the child was six months old, the court took jurisdiction over the child and placed the child in a non-relative foster home. The court entered parent-agency agreements for each parent. Mother's agreement required her to have a psychological evaluation, submit to weekly random drug screens, attend parenting classes and individual counseling, obtain suitable housing, and maintain contact with the caseworker. The court ordered that mother have

¹ Mother's rights to her older child had been terminated in early 2010.

supervised visits with the child. Father's agreement was similar: attend parenting classes and individual counseling, provide weekly random drug screens, obtain income and suitable housing, and maintain contact with the caseworker. The court authorized both parents to have supervised visits with the child, provided that the parents complied with the requirement of submitting negative drug screens.

Neither parent visited the child from September 2011 through December 2011. Mother missed many of the required drug screens during that period, and father missed some of his required screens. In addition, neither parent consistently attended counseling until December 2011. By June of 2012, after a series of contested hearings, the circuit court found that there was clear and convincing evidence of statutory grounds for termination. However, the court noted that the parents had at least sporadically attempted to comply with their case services plans, and that as such termination was not in the child's best interest.

Shortly after the June 2012 hearing, both mother and father stopped communicating with the caseworker and stopped visiting the child. In October 2012, father was arrested for domestic violence against his younger sister. Father pleaded guilty to misdemeanor domestic violence and spent some time in jail. Father began visiting the child again sporadically in late 2012. Mother did not visit the child for the remainder of the year, apparently due to mother's inability or unwillingness to submit negative drug screens.

In March 2013, the court held a final termination hearing and determined the evidence now indicated that the child's best interests required termination of both parents' rights. The court noted that both parents had essentially disappeared from the child's life for the last five months of 2012.

Both parents appealed the termination orders. In addition, mother sought a remand for a hearing on the effectiveness of her counsel. Mother presented an affidavit indicating that she had wanted to testify at trial, but that her counsel coerced her into relinquishing her right to testify. This Court remanded for an evidentiary hearing on the issue of effectiveness of counsel and for a ruling on mother's motion for a new trial.

The trial court held the evidentiary hearing on December 3, 2013. Mother's trial counsel testified that at the close of the final proceeding she thought the trial court would take a break, which would have enabled counsel additional time to confer with mother. Counsel noted, however, that she had given mother the choice as to whether to testify, and that she would not have stopped mother from testifying if mother had wanted to testify. Counsel confirmed that mother knew she had a right to testify, and that mother had in fact testified at one of the previous contested custody hearings. Counsel also confirmed she had been unable to reach mother for the seven months preceding the final hearing. Counsel acknowledged that she told mother something to the effect that if mother testified, the other attorneys would "rip [mother] to shreds." Counsel testified that this advice to mother was a matter of trial strategy.

Mother testified that when she was at the final hearing she felt coerced into relinquishing her right to testify. Mother further testified that if she had been given the opportunity to testify, she would have explained why she had difficulty breaking her addiction to marijuana and why she had been unable to maintain stable housing.

The trial court found that mother's counsel was effective. The court denied mother's motion for a new trial.

II. EFFECTIVENESS OF MOTHER'S TRIAL COUNSEL

Mother argues that the evidence at the hearing on remand demonstrated that trial counsel was ineffective for failing to give mother a realistic opportunity to testify at trial. At the hearing, mother explained that she felt coerced and intimidated into not testifying. Mother further explained that if she had testified at trial, she would have testified that petitioner failed to provide her with the court-ordered assistance she needed for her drug addiction and housing problems. In addition, mother would have testified that she and the child shared a strong bond. Mother contends that this testimony would have explained mother's purported noncompliance with services and also would have explained her relapse into addiction. We disagree.

"[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2001). To prevail on a claim of ineffective assistance of counsel, a respondent must demonstrate that trial counsel's performance fell below an objective standard of reasonableness. *Id.* at 198. In addition, a respondent must establish a reasonable probability that the outcome of the proceeding would have been different but for counsel's alleged errors. *Id.*

In this case, mother has not established that her trial counsel was ineffective with regard to the advice not to testify. At the hearing on remand, mother's counsel testified that she had advised mother not to testify as a matter of trial strategy. This Court will not second-guess matters of trial strategy. See *People v Trakhtenberg*, 493 Mich 38, 52-55; 826 NW2d 136 (2012).

In addition, mother has not demonstrated any reasonable probability that the outcome of the proceeding would have been different if she had testified. The trial court, having heard the testimony from the termination proceedings and mother's testimony at the remand hearing, found that opposing counsel would have discredited mother's proffered testimony. This finding indicates that the trial court found mother's proffered testimony lacking both in credibility and in substance. This Court will not disrupt the trial court's credibility assessment. *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859, amended 481 Mich 1201 (2008). Likewise, the record supports the trial court's conclusion that the substance of mother's testimony would not have altered the outcome of the proceeding. Mother's proffered testimony regarding the lack of services would have been contradicted by the caseworker's detailed testimony about the services offered to mother and about mother's lack of consistent compliance with services. In sum, mother has not established that her counsel was ineffective, and the trial court properly denied mother's motion for a new trial.

III. PROCEDURAL DUE PROCESS RIGHTS FOR VISITATION AND SERVICES

Both respondents contend that the termination proceedings violated their constitutional rights to procedural due process. Specifically, mother contends that petitioner violated her due process rights by failing to refer her to court-authorized inpatient drug treatment services. Father contends that the court violated his due process rights by restricting his visitation with the child.

We review these unpreserved issues for plain error affecting respondents' substantial rights. *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011).

Procedural due process claims must be grounded on an assertion that the government deprived the claimant of a significant interest without providing the requisite procedural safeguards. *Bonner v City of Brighton*, 495 Mich 209, ___; ___ NW2d ___ (2014), slip op p 24. The basic aspect of procedural due process is that individuals involved in court proceedings receive notice and an opportunity to be heard. *Id.* To prevail on their constitutional claims, respondents must demonstrate that the alleged constitutional errors affected the outcome of the proceedings. *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

The record in this case confirms that both respondents had ample notice of the requirements of the case service plans and had several opportunities to either object to the plans or to request the available services. Consequently, respondents cannot demonstrate basic violations of procedural due process with regard to the hearings. More significantly, neither respondent can demonstrate that the alleged errors affected the outcome of the proceedings. For mother, the record confirms regardless of whether mother had obtained inpatient substance abuse treatment, her parental rights were subject to termination under MCL 712a.19b(3)(l), because of the termination of mother's rights to her older child. Inpatient treatment for substance abuse would not have altered that statutory ground for termination. Similarly, the court's best interest analysis turned on mother's longstanding lack of cooperation with any of the services offered to her, including parenting classes and psychiatric treatment. Accordingly, mother has not established how the lack of a referral for inpatient services would have altered the outcome of the termination proceedings.

Father appears to contend that the court-ordered restriction on his parenting time was a due process violation. We disagree. This Court has recognized that a trial court has discretion to place conditions on parenting time between the time of adjudication and the filing of a termination petition: "the issue of the amount, if any, and conditions of parenting time following adjudication and before the filing of a petition to terminate parental rights is left to the sound discretion of the trial court and is to be decided in the best interests of the child." *In re Laster*, 303 Mich App 485, 490; 845 NW2d 540 (2013).

IV. BEST INTERESTS

Both parents argue that the circuit court erred in determining that termination of their rights was in the child's best interest. We review the circuit court's decision for clear error. MCR 3.977(K).

Once a circuit court has confirmed that there is a statutory ground for termination under MCL 712A.19b(3), the court must order termination of a parent's rights if the court finds by a preponderance of the evidence that termination is in the child's best interests. MCL 712A.19b(5); *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013); see also MCR 3.972(C)(1). This Court recently reiterated that a trial court may consider multiple factors when making a best interest determination:

To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include 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. 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, 713-714; ___ NW2d ___ (2014) (quotation marks and citations omitted).]

In this case, nearly all of these factors indicated that termination was in the child's best interests. During the two years of proceedings, the parents essentially disappeared from contact with the child for two lengthy time periods: from August through December of 2011, and again from July through December of 2012. The caseworker testified that she observed no parental bond between the child and either parent. In contrast, the caseworker testified that the child was bonded to the caregiver and was thriving in the caregiver's custody. The caseworker confirmed that neither parent fully complied with the case service plans, and neither parent maintained consistent visits with the child. In addition, father had been arrested for domestic violence against a family member during the course of the proceedings and mother had been arrested for larceny. These factors in the record support the trial court's decision that, given the child's young age and the length of time she had been in the court's jurisdiction, termination of both parents' rights was in the child's best interests.

V. STATUTORY GROUNDS FOR TERMINATION AGAINST FATHER

Father argues that his progress toward compliance with his case service plan negated any statutory grounds for termination of his parental rights. We disagree.

We review for clear error the circuit court's determination regarding the statutory grounds for termination. MCR 3.977(K). Before terminating a parent's rights, the circuit court must find by clear and convincing evidence that one or more statutory grounds for termination exists. MCL 712A.19b(3). If this Court concludes that the evidence supports at least one statutory ground for termination, the Court need not address the remaining statutory grounds. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009). Father first challenges the statutory ground of desertion, MCL 712a.19b(3)(a)(ii). The statute allows a court to terminate a parent's rights if the court finds by clear and convincing evidence that the parent "has deserted the child for 91 or more days and has not sought custody of the child during that period." *Id.* Father acknowledges that there were periods of time when he did not visit the child, but argues that those periods did not constitute desertion for purposes of MCL 712a.19b(3)(a)(ii). According to father, he is not accountable for the lapses in his visits, because the lapses were the result of undue restrictions placed on him by the trial court.

Father's argument lacks both legal and factual merit. First, this Court has determined that once a court has taken jurisdiction over a child, the court may impose conditions on parenting time. *Laster*, 303 Mich App at 490. The court need not make a finding of harm before imposing conditions on parenting time. *Id.* Second, the record in this case demonstrates that father essentially disappeared from the child's life for four months in 2011 and for six months in 2012.

Father testified that, at least with regard to the second absence, he did not want to be around the child because he was angry and depressed. This pretext does not alter the fact that father deserted the child for more than 91 days. The desertion was a sufficient statutory ground for termination of father's parental rights.

Having determined that there was clear and convincing evidence of a statutory ground for desertion, we need not address the remaining statutory grounds.

VI. REASONABLE SERVICES FOR FATHER

Father argues that petitioner failed to provide him with reasonable services to obtain suitable housing for himself and for the child. According to father, the caseworker merely handed him pieces of paper, but never actually assisted him in obtaining suitable housing. Father's argument is misplaced. This Court has recognized that petitioner's obligation to provide services is paired with a commensurate responsibility on the part of the parent to benefit from the services offered. *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005), superseded by statute on other grounds, MCL 712A. 19b(5), ("it is not enough merely to go through the motions; a parent must benefit from the services offered"). The caseworker indicated that father failed to maintain consistent contact with the case services agency. Father's lack of contact affected both the caseworker's ability to provide him with services and father's ability to avail himself to services. Given father's inconsistent contact with the caseworker, he cannot now complain that the services offered were insufficient.

VII. CONCLUSION

The circuit court's order terminating respondents' parental rights are affirmed. The court's denial of mother's motion for a new trial is also affirmed.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey