

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JOHN MARCUS SIKORSKI,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JENNIFER MERCY RYBICKI,

Respondent-Appellant.

UNPUBLISHED

May 21, 2009

No. 289482

Grand Traverse Circuit Court

Family Division

LC No. 07-002225-NA

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Respondent mother appeals as of right the trial court's decision to terminate her parental rights pursuant to MCL 712A.19b(3)(c)(i), (d), (f), (g), and (j). We affirm.

This Court reviews decisions terminating parental rights for clear error. MCR 3.977(J). Clear error has been defined as a decision that strikes this Court as more than just maybe or probably wrong. *In re Trejo*, 462 Mich 341, 357; 612 NW2d 407 (2000).

The trial court did not clearly err in finding that sections (c)(i) and (g) were established by clear and convincing evidence. The conditions leading to adjudication were that respondent mother's newborn baby Kody was born addicted to morphine, and the minor child John was in a limited guardianship for which respondent mother had not complied in maintaining a drug-free lifestyle, employment, or a stable home. At the time of trial, respondent mother had not rectified the conditions leading to adjudication and could not provide proper care and custody for John. We find that the trial court also did not clearly err in finding that respondent mother could not rectify the conditions leading to adjudication or provide proper care and custody for John within a reasonable time considering his age. The limited guardianship was pending for two years and respondent mother made no progress toward maintaining a drug-free lifestyle, maintaining employment, and maintaining stable employment. Although respondent mother testified that her bipolar medication was finally adjusted correctly and that she had been working with a counselor and with an AA sponsor, respondent mother still tested positive for alcohol within the same month the termination trial began and had not provided documentation of this progress to her foster care worker. Therefore, the trial court did not clearly err in finding that sections (c)(i) and (g) were established by clear and convincing evidence.

Further, although the trial court erred in finding that section (f) was established, the court did not clearly err in finding that section (d) was established. The limited guardianship plan required respondent mother to maintain a drug-free lifestyle, maintain employment, and have stable housing. Respondent mother's failure to maintain a drug-free lifestyle resulted in the guardian, and court, suspending visitation with John so that her relationship with him was disrupted. However, petitioner did not establish that respondent mother did not visit or pay child support for more than two years. Therefore, the trial court clearly erred in finding that section (f) was established. However, the error was harmless where other statutory grounds for termination were established by clear and convincing evidence.

Finally, the trial court did not clearly err in finding that section (j) was established by clear and convincing evidence. Respondent mother had substance abuse issues. She had no stable home and had not paid child support for her son in a significant period of time. Respondent mother attempted suicide multiple times in the preceding years. John had not lived with her in five years. Although respondent mother testified that she was making progress, she was not ready to have John placed in her home, and even her AA sponsor recommended only supervised visitation. While respondent mother had never harmed her children, she had never cared for them full time, and her tentative sobriety and emotional status made for a reasonable likelihood that John would be harmed if returned to respondent mother's home.

Respondent mother also argues that her trial counsel was ineffective for failing to call two witnesses, Dr. Hendricks and Mary O'Connor. 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). The decision to call a witness is a matter of trial strategy and may only constitute ineffective assistance of counsel where it deprives the respondent of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

On the record before this Court, respondent mother did not establish ineffective assistance of counsel. Respondent mother testified that she saw Dr. Hendricks monthly, and other witnesses testified that respondent mother said that Dr. Hendricks prescribed morphine to respondent mother. While Dr. Hendricks may have testified that he prescribed the morphine used before the beginning of the case, he certainly would not have testified that he prescribed cocaine and alcohol use. Therefore, Dr. Hendricks's testimony regarding morphine prescriptions would not have been a defense to respondent mother's use of other substances during the pendency of the case. It is also possible that trial counsel interviewed Dr. Hendricks and decided that his testimony would have hurt respondent mother more than it would have helped her. For these reasons, trial counsel was not ineffective for failing to call Dr. Hendricks as a witness.

Similarly, trial counsel was not ineffective for failing to call Mary O'Connor as a witness. Respondent mother testified that she was scheduled to see Ms. O'Connor weekly for therapy and attended about 75 percent of their meetings. Documentation of attendance at therapy was required by the parent-agency agreement. Respondent mother never provided documentation and was supposed to see another therapist instead. However, even if respondent mother had faithfully attended counseling sessions, and Ms. O'Connor testified that she was making progress, the real problems were respondent mother's substance use and failure to maintain employment and a home. Further, trial counsel's investigation may have revealed that Ms. O'Connor's testimony would have hurt respondent mother more than it would have helped her.

Because respondent mother was not deprived of a defense and the failure to call Ms. O'Connor may have been a matter of trial strategy, trial counsel was not ineffective for failing to call Ms. O'Connor.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Douglas B. Shapiro