

STATE OF MICHIGAN
COURT OF APPEALS

In re VANGORDER, Minors.

UNPUBLISHED
May 14, 2015

No. 324716
Ingham Circuit Court
Family Division
LC No. 14-001220-NA

Before: BOONSTRA, P.J., and SAAD and MURRAY, JJ.

PER CURIAM.

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

A petition for permanent custody was filed to terminate respondent's parental rights after she was caught selling prescription narcotics to undercover officers on two occasions. Respondent's two young children were in the car during one of the transactions. Pursuant to MCL 722.638(1)(a), petitioner filed a petition seeking the court's jurisdiction because there was a risk of harm to the children and in 2009 respondent's parental rights to another child had been terminated under MCL 712A.2(b). The petition indicated that termination of parental rights would be sought pursuant to MCL 712A.19b(3)(l) based on the fact that "[t]he parent's rights to another child were terminated as a result of proceedings under [MCL 712A.2(b)] or a similar law of another state."

I. DISPOSITION HEARING

Respondent first claims that she was wrongfully denied a separate disposition hearing. A trial court may enter an order terminating parental rights at the initial dispositional hearing pursuant to a request in an original or amended petition. MCR 3.977(E)(1); MCL 712A.19b(4). The procedural requirements for terminating parental rights at an initial dispositional hearing are governed by MCR 3.977(E), which states:

The court shall order termination of the parental rights of a respondent at the initial dispositional hearing held pursuant to MCR 3.973, and shall order that additional efforts for reunification of the child with the respondent shall not be made, if

(1) the original, or amended, petition contains a request for termination;

(2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;

(3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:

(a) are true, and

(b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g) (h), (i), (j), (k), (l), (m), or (n);

(4) termination of parental rights is in the child's best interests.

The trial court fully satisfied the procedural requirements of MCR 3.977(E). The original and amended petition clearly contained a request to terminate respondent's parental rights. During a preliminary hearing, an adjudicative trial was scheduled and was later conducted on October 20, 2014. At the conclusion of the jurisdictional phase, the trial court determined by a preponderance of the evidence that the children came within the court's jurisdiction.

Contrary to respondent's claim, the dispositional hearing was held immediately after the court had properly acquired jurisdiction over the children. Once a court finds that a child is within the jurisdiction of the court, the dispositional phase follows. *In re AMAC*, 269 Mich App 533; 711 NW2d 426 (2006). The dispositional phase may include hearings on termination of parental rights and initial dispositional hearings. See MCR 3.973–MCR 3.977. The purpose of the dispositional hearing is “to determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult, once the court has determined following trial, plea of admission, or plea of no contest that one or more of the statutory grounds alleged in the petition are true.” MCR 3.973(A). MCR 3.973(B), which governs notice of dispositional hearings, contemplates a combined adjudicative and dispositional hearing: “[u]nless the dispositional hearing is held immediately after the trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920.” (Emphasis added). Moreover, MCR 3.973(C) gives the court discretion in scheduling the dispositional hearing after the jurisdictional trial, typically to afford DHS time to prepare a case service plan when permanent custody is not being sought. See MCR 3.973(E)(2). Accordingly, the two hearings may be combined when termination is sought at an initial disposition.¹

¹ We note that a trial court could avoid many of the issues raised in cases with combined hearings by clearly indicating on the record when the move from adjudication to disposition has occurred; such an indication would render the record on appeal more amenable to appellate review.

Respondent misinterprets *In re Nunn*, 168 Mich App 203; 423 NW2d 619 (1988), to support her contention that she was entitled to a separate dispositional hearing. In *Nunn*, this Court held that the probate court erred in terminating parental rights after the adjudicative trial without holding a dispositional hearing. Unlike the present case, the court terminated parental rights without having been requested to do so in the initial petition. The petition in *Nunn* did not include a request to terminate the respondent's parental rights and merely requested that the probate court take jurisdiction of the minor children. *Id.* at 207. This Court stated that adjudicative and dispositional hearings were not intended to be held simultaneously; however, this was under the former court rule, MCR 5.908(A). Moreover, the key focus in *Nunn* was the denial of due process when terminating parental rights "before a proper petition seeking such termination has been filed" and apprising a parent of the nature of the proceedings and an opportunity to be heard. *Id.* at 208. The petitioner in *Nunn* jeopardized the respondent's right to due process because it failed to place in the record its intent to terminate the respondent's parental rights until final argument, and thus had not adequately notified the respondent of charges "with sufficient clarity and specificity to reasonably apprise the parent of the matters concerning which the court action [was] sought." *Id.* at 208.

Similarly, in *In re AMAC*, 269 Mich App 533, 538; 711 NW 2d 426 (2006), this Court held that the trial court erred by not affording the respondent her right to a dispositional hearing. This Court stated that the dispositional phase is especially important when one of the statutory grounds for termination is clearly and convincingly established during the adjudicative phase because it provides the respondent with an opportunity to persuade the court that termination is not in the child's best interests. *Id.* at 539. However, in *AMAC*, the trial court rendered a written opinion without a best interests hearing even though the respondent's attorney and the lawyer-guardian ad litem had stated on the record during the adjudication trial that there would be a separate best interests hearing. *Id.* at 535.

None of the procedural errors that occurred in *Nunn* and *AMAC* exists in this case. Respondent had notice in the original and amended petition that petitioner was seeking to terminate her parental rights at the initial disposition. Respondent was reminded at the preliminary hearing that petitioner was seeking to terminate her parental rights and that reunification services would not be offered. Additionally, all parties were put on notice that the jurisdictional trial and disposition would occur at the same hearing. At the beginning of the proceedings, petitioner's counsel advised the court and all parties as follows: "People are ready to proceed with regard to a trial on jurisdiction and request for permanent wardship and initial disposition regarding [respondent]." Here, it was undisputed that respondent's parental rights had been terminated with regard to one of her other children. Thus, as in *AMAC*, the dispositional phase was especially important to respondent. However, respondent was not denied an opportunity to present evidence on the issue of the children's best interests. None of the parties anticipated a separate best interests hearing, and respondent was keenly aware that termination of her parental rights to these children would be sought because of the previous involuntary termination. Lastly, unlike *Nunn* and *AMAC*, a disposition hearing was clearly contemplated and conducted immediately after the conclusion of the jurisdictional trial. Although the trial court did not state directly on the record that it had concluded the jurisdictional trial and was moving to the dispositional phase, it can be clearly inferred by a reading of the record that the trier of fact first made findings of fact and conclusions of law regarding jurisdiction before directly addressing statutory grounds for termination and a best interests

determination, including a discussion of the various burdens of proof for each phase of the proceedings. Consistent with the findings placed on the record, the trial court issued separate orders for the adjudication trial and the termination hearing.

II. STATUTORY GROUNDS

Respondent next challenges the trial court's findings that statutory grounds for termination of parental rights were established by clear and convincing evidence. Before terminating a respondent's parental rights, the trial court must make a finding that at least one of the statutory grounds under MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). MCL 712A.19b(3)(j) and (l) were established by clear and convincing evidence. These statutory grounds state:

(3) 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:

* * *

(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.

* * *

(l) The parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter or a similar law of another state.

* * *

The proofs showed by clear and convincing evidence that respondent's home was an unfit place for the children because of respondent's neglect or criminality and that her parental rights to another child had been terminated. It was uncontroverted that in 2007 respondent's oldest child was removed from her care because of substantiated allegations for abuse and neglect involving domestic violence. Respondent gave birth to a second child who was removed from her care at birth because the oldest child was in foster care. Respondent's parental rights to her second child were later terminated because she did not actively participate in and benefit from offered reunification services. Respondent's parental rights to the oldest child were also subject to a termination petition; however, that child was placed in a guardianship with her paternal grandparent in May 2008. At some point respondent moved to Ohio in an attempt to avoid having her parental rights to her new children terminated in Michigan. A petition to terminate respondent's parental rights to these children at initial disposition was filed because of respondent's Child Protective Services (CPS) history and because she was reportedly selling drugs while her children were present. Two witnesses testified that this occurred. Respondent admitted to the undercover officer and a DHS worker that she sold the narcotics because she needed that money to make ends meet.

Respondent argues that termination was improper under MCL 712A.19b(3)(j) and (l) because there was no evidence that she had ever intentionally harmed the children and because her home was appropriate. Respondent also emphasizes that Ohio CPS had determined that respondent was a fit parent. However, neither intentional nor direct harm is required by the plain language of the statute. The trial court reasonably concluded that there was clear and convincing evidence to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(j) and (l) because there was a prior termination of rights and there would be a substantially high risk of harm to the children in the event that respondent participated in another drug buy even though respondent would not intentionally harm her children directly. Engaging in an illegal narcotic deal with young children in tow is fraught with an inherent danger of a drug deal "going bad". It was likely that respondent, who was unemployed and financially unstable, would engage in criminal activity in the future. That respondent had lost the custody of one child and had her parental rights to another child terminated did not appear to have any deterring effect on her behavior to the detriment and safety of her younger two children. There is nothing in the record to indicate that the trial court failed to consider and gave lesser weight than was warranted to an earlier determination in Ohio as to respondent's apparent fitness, which may or may not have taken into consideration respondent's CPS history in Michigan.

III. BEST INTERESTS

The trial court did not clearly err in finding that termination was in the children's best interests. *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003); MCR 3.977(K). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). Clear error exists "if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004). A trial court may consider evidence on the whole record in making its best-interest determination. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The trial court's findings need not be extensive; "brief, definite, and pertinent findings and conclusions on contested matters are sufficient." MCR 3.977(I)(1).

A best interests finding must be supported by a preponderance of the evidence. *In re Moss*, 301 Mich App at 83. The trial court may consider various factors, including the child's bond to the parent, *In re BZ*, 264 Mich App at 301, the parent's parenting ability, *In re Jones*, 286 Mich App 126, 129-130; 777 NW2d 728 (2009), the child's need for permanency, stability and finality, *In re Gillespie*, 197 Mich App 440, 446-447; 496 NW2d 309 (1992), and the advantages of a foster home over the parent's home, *In re Foster*, 285 Mich App 630, 634-635; 776 NW2d 415 (2009).

Respondent emphasizes that the trial court did not fully consider that she was bonded with her children and was the only parent the children had ever known. Further, she points out that there was no evidence that the children had ever been harmed. Although the record supports some of these assertions, the trial court's best interests determination was not clear error.

Contrary to respondent's assertions, the trial court made a best interests determination for each child individually and considered whether the children should be kept together as required under *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012). Child

protective proceedings are viewed as one continuous proceeding, and therefore the trial court properly considered respondent's entire case history when determining whether to terminate her parental rights and when making a best interests determination. *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973). The trial court noted that one child would likely be placed with his father in Arizona and the other would be placed with her father in Ohio, pending a satisfactory home study. Additionally, the trial court specifically stated that it was in the children's best interests to terminate respondent's parental rights even though they would be placed with their respective fathers, noting that such placement was a factor that weighed against termination under *In re Olive/Metts*. The trial court succinctly stated:

The real factor that weighs heavily towards termination of parental rights is the parent's parenting ability. This is not the first – I mean, look, we've had two other children. She's had four children. Two of the children don't live with her anymore. One we terminated parental rights on. The other one we were going to, except there's a guardianship in place. Given the opportunity to provide care for these children, what happens? Well, she takes them along with her to a drug buy, and for the reason that she says that she can't make ends meet on the money that she has. So she's clearly not able to provide for the children and she's willing to turn to criminality in order to provide for her children. And, while she does that, she's willing to place those children in direct harm's way by having them in the car during the drug buy. She doesn't have any parenting ability for me to work with. So that factor weighs heavily in favor of termination.

The trial court reasonably concluded that placing the children with their fathers would provide them with needed finality, permanency and stability. Reading the whole record, we are not left with a firm conviction that a mistake was made in finding that terminating respondent's parental rights was in the children's best interests.

IV. INEFFECTIVE ASSISTANCE

Respondent's last claim, that she received ineffective assistance of counsel, is groundless. In analyzing claims of ineffective assistance of counsel at termination hearings, this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error. *Id.* at 579. This Court reviews de novo questions of constitutional law. *Id.* Effective assistance of counsel is presumed and the respondent bears a heavy burden of proving otherwise. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). To establish a claim for ineffective assistance of counsel, it must be shown that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Id.*

Here, additional evidence proffered in conjunction with respondent's motion for a new trial was largely cumulative and would not have had any bearing on the outcome of the proceedings. Respondent provided an offer of proof, arguing that she had good parenting skills, as demonstrated by her raising of the two children during their entire lifetimes, in addition to adequate housing and income. Further, respondent pointed out that she had enrolled her children in preschool and the Ohio CPS case had been investigated and closed. The trial court noted that these matters were brought up during the trial and thus respondent's counsel had properly brought the relevant evidence to the trial court's attention.

Moreover, respondent's counsel's ability to question respondent about the adequacy of her financial situation was limited. Respondent asserted her Fifth Amendment Right against self-incrimination when asked if she had sold drugs because she was unable to provide for her children. The proffered evidence was largely cumulative and would have had little bearing on the outcome of the case. Thus, respondent has not overcome the presumption that, under the circumstances, respondent's counsel's limited questioning of respondent was part of a sound trial strategy and well within the bounds of objectively reasonable professional standards. Based on a full review of the record, we conclude that there is no evidence that respondent was denied effective counsel.

Affirmed.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Christopher M. Murray