

STATE OF MICHIGAN
COURT OF APPEALS

In re KRUGER, Minors.

UNPUBLISHED
July 16, 2015

No. 325855
Monroe Circuit Court
Family Division
LC No. 14-023286-NA

Before: FORT HOOD, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Respondent-mother appeals the order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(e), (g), and (j). We affirm.

First, respondent claims that petitioner failed to establish by clear and convincing evidence statutory grounds for termination. We disagree. “To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established.” *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). “We review for clear error a trial court’s finding of whether a statutory ground for termination has been proven by clear and convincing evidence.” *Id.*; *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004).

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

(e) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8206, and the parent has substantially failed, without good cause, to comply with a court-structured plan described in section 5207 or 5209 of the estates and protected individuals code, 1998 PA 386, MCL 700.5207 and 700.5209, regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship.

* * *

(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.

We initially address MCL 712A.19b(3)(e). In 2011, respondent's twin children, then almost two years old, were placed in a full guardianship with her mother and stepfather ("grandparents") because of respondent's drug use, which she admitted interfered with her ability to provide proper care and custody for her young children. The trial court implemented a "court-structured reunification plan," which primarily concerned respondent's substance abuse.¹ The court-structured plan, as amended, required respondent to undertake certain actions, including attending AA meetings, participating in substance abuse treatment and complying with after-care requirements, submitting to random drug screens, obtaining and maintaining stable housing and employment, visiting her children, and significantly, abstaining from drug and alcohol use. In the more than three years since the guardianship was established, respondent participated in numerous intensive treatment programs. Unfortunately, despite her participation and progress in treatment, respondent, without good cause, failed to abstain from drug use, relapsing six different times during the guardianship.

The evidence further established that respondent's repeated relapses and inability to successfully address her substance abuse resulted in periods of separation from the children and delayed reunification with them, thereby disrupting her parent-child relationship with the children. See MCL 712A.19b(3)(e). Significantly, two of her relapses, including her most recent, occurred while respondent was participating in intensive services and close to reunifying with the children, thwarting reunification efforts and abruptly disrupting her parenting time, which upset the children. The children's guardian testified that, because of respondent's separations from her young children, who were only five years old at the time of the termination hearing, her relationship with them was "a little estranged," lacking a mother-child relationship and was more like that of an older sister. Meanwhile, it was undisputed that the children developed a "very strong attachment" to and a parent-child bond with their grandparents and looked to their grandparents to meet their everyday physical and emotional needs. Although respondent believed that she had a parent-child relationship with the children, and her father testified that he observed a mother-child relationship between respondent and the children, respondent acknowledged that the guardians shared a loving bond with the children and were "more in the parent role" than she was.²

¹ During a guardianship proceeding, the court may "[o]rder the parties to follow a court-structured plan designed to resolve the conditions" that prevent the parent from personally caring for the child. MCL 700.5207(3)(b)(ii)(B).

² The trial court explicitly found credible the guardian's characterization of respondent's relationship with her children, as supported by the guardian's opportunity to regularly observe the children and respondent. The evidence supports this finding and, giving due regard to the

Based on the record, we do not agree that the trial court clearly erred in determining that termination was proper pursuant to MCL 712A.19b(3)(e) because respondent substantially failed to comply with her court-structured reunification plan and that her noncompliance resulted in a disruption of the parent-child relationship. Although only one statutory ground need be established to support termination of parental rights, *In re Frey*, 297 Mich App 242, 244; 824 NW2d 569 (2012), we further hold that the trial court did not err in determining that the evidence also supported termination pursuant to MCL 712A.19b(3)(g) and (j).

In regard to MCL 712A.19b(3)(g), respondent was unable to provide proper care and custody for her children before or during the guardianship due to her drug use, mental health issues, failure to consistently maintain stability in housing or employment, and involvement in a lengthy abusive relationship. By the time of the termination hearing, respondent had demonstrated some progress toward being able to provide proper care and custody for the children. Respondent had obtained and maintained suitable housing and part-time employment, ended her abusive relationship with her boyfriend, and was receiving ongoing treatment for her substance abuse issues and mental health issues. Respondent had maintained sobriety for over five months, and appeared motivated and committed to her recovery. However, respondent's repeated relapses showed that her prior attempts at continuous sobriety with similar or more intensive treatment in place were largely unsuccessful. Respondent acknowledged that she needed to maintain her sobriety for at least one year before she would be ready to parent the children, and stated that she did not know how long it would take her before she would be in a position to have her children returned to her care. Further, respondent's therapist cautioned that respondent could relapse "very quickly," as she had in the past, and that relapse was a very high risk for patients like respondent. In light of this evidence, it remained highly uncertain whether she would be able to maintain her sobriety so that she could provide her children with a stable and safe home within a reasonable time. While respondent's continued participation in services evidenced her willingness and commitment to addressing her substance abuse issue, she must actually demonstrate a benefit from the services, which unfortunately, she had been unable to do. See *In re Frey*, 297 Mich App at 248.

Additionally, the record established that respondent's continuous struggle with substance abuse presented a risk of harm to the young children if they were returned to her care. MCL 712A.19b(3)(j). When respondent used drugs before the guardianship, she left her young children with other individuals who were not proper custodians for prolonged periods of time. During the guardianship, her drug use led to a disruption in her parenting time and periods of separation from the children, inconsistent employment, housing instability, and criminality. Respondent exhibited poor decision-making by involving herself in a physically abusive relationship for a lengthy part of the guardianship, which she attributed to her co-dependency and self-worth issues that she had admittedly not yet fully resolved in therapy. Respondent's repeated relapses indicated an inability to change her pattern of substance abuse within the foreseeable future and a likelihood of future relapse that would likely lead again to behavior detrimental to the children's wellbeing if they were returned to her home.

trial court's special opportunity to observe the witnesses, we find no clear error. *In re BZ*, 264 Mich App at 296-297.

Given this record, we conclude that the trial court did not clearly err in finding that clear and convincing evidence supported the statutory grounds for termination pursuant to MCL 712A.19b(3)(e), (g), and (j). *In re Moss*, 301 Mich App at 80.

Next, respondent argues that the trial court clearly erred in determining that termination was in the children's best interests. We disagree. "Once a statutory ground for termination has been proven, the trial court must find that termination is in the child[ren]'s best interests before it can terminate parental rights." *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012); MCL 712A.19b(5). "[W]hether termination of parental rights is in the best interests of the child[ren] must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App at 90. This Court reviews the court's determination regarding the children's best interests for clear error. *In re Olive/Metts*, 297 Mich App at 40.

"In deciding whether termination is in the child's best interest, the court may consider 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." *Id.* at 41-42 (internal citations omitted). Further, the court may consider whether the parent can provide a permanent, safe, and stable home, *In re Frey*, 297 Mich App at 248-249, and the length of time the child may be required to wait for a parent to rectify her issues, *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991). "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, 714; 846 NW2d 61 (2014).

Viewing the record in its entirety, in light of these factors, we conclude that a preponderance of the evidence supported the trial court's finding that termination of respondent's parental rights was in the children's best interests. For over three years, the children had been in the primary custody of their grandparents who by all accounts physically and emotionally supported the children and provided them with a stable, loving, and safe home. While respondent made some progress toward gaining stability by the time of the termination hearing, she acknowledged that she was not ready to provide her children with a stable and safe environment. Unfortunately, it remained highly uncertain whether she would be successful at her recovery this time. Respondent admitted that it was unfair to keep the children "in limbo" while she attempted to work toward recovery, and that the children needed to know where they were going to live on a long-term basis. The testimony showed that the children had developed a very strong and loving parent-child bond with their grandparents, looked to their grandparents for their emotional and physical needs, viewed their grandparents as their parental figures, and were doing well and were comfortable in their care and custody. The grandparents were willing to adopt the children and provide them with continued stability and a permanent home.³ On this

³ Although respondent believed she had a mother/child relationship with the children, the trial court disagreed, finding that, although her children may call her "mom," she had not served in a parental role "earned by consistent care and providing for the child[ren]'s needs in a regular and substantial way" and found credible the guardian's assessment of her relationship with the children as more of an older sister relationship. We must give "due regard to the trial court's

record, we agree that the best interests of the children would be served by the stability and permanency that their grandparents could provide through termination and adoption, and thus, the trial court did not clearly err in its best-interest determination.

We reject respondent's claim that the trial court clearly erred in failing to explicitly address the fact that the children were in relative placement in determining their best interests. A child's placement with relatives weighs against termination, and thus, "the fact that a child is living with relatives when the case proceeds to termination is a factor to be considered in determining whether termination is in the child's best interests." *In re Olive/Metts*, 297 Mich App at 43, citing *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010). Here, the trial court expressly considered the children's placement with their grandparents. The court found that the children had been in the care and custody of their grandparents for over three years of their young lives because of respondent's ongoing substance abuse, were "very settled" in their grandparents' home, and were bonded to their grandparents who desired to adopt them. The court concluded that termination, as opposed to continuing the current guardianship, was in the children's best interests to assure the children the true stability and permanency they deserved, which could only be accomplished through termination. Clearly, contrary to respondent's argument, the trial court explicitly addressed whether termination was appropriate in light of the children's placement with relatives. Further, contrary to respondent's argument, the trial court also considered the children individually in its best-interest determination. *In re Olive/Metts*, 297 Mich App at 42.

Respondent next argues that her trial counsel provided ineffective assistance by failing to call her children as witnesses to provide testimony regarding their bond with her to assist the court in determining their best interests. We disagree. "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). "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) (citation omitted). "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.* (citation omitted). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); see also *In re Simon*, 171 Mich App at 447. Generally, ineffective assistance of counsel may be established by the failure to call witnesses only if it deprived respondent of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (citation omitted).

Respondent's counsel elicited favorable testimony regarding respondent's bond with the children from respondent, her father, and the guardians, including that respondent shared a bond with the children, they loved her, she loved them, the children knew respondent was their mother, she regularly visited and maintained contact with the children, and the children enjoyed

special opportunity to observe the witnesses," *In re BZ*, 264 Mich App at 296-297, and find no clear error in the court's findings, which were supported by the evidence.

visits with her and looked forward to seeing her. Accordingly, trial counsel's failure to call the children as witnesses did not deny respondent the opportunity to present her defense that termination was not in the children's best interests because of her bond/relationship with the children. Nor did respondent overcome the strong presumption that trial counsel elected as a matter of sound trial strategy, in light of the children's young age, to elicit testimony regarding her relationship with them from the adult witnesses and not to call the children as witnesses. We will not substitute our judgment for that of counsel on matters of trial strategy. *Id.* Additionally, respondent "merely speculated" that the children would have provided favorable testimony, and thus, failed to establish that their testimony would have affected the outcome of the proceedings. *Id.* Therefore, respondent has not overcome the strong presumption that trial counsel provided her with effective assistance.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Michael J. Riordan