

STATE OF MICHIGAN
COURT OF APPEALS

In re HAYES/MCCULINGS, Minors.

UNPUBLISHED
November 13, 2014

No. 320413
Wayne Circuit Court
Family Division
LC No. 13-513823-NA

Before: WHITBECK, P.J., and FITZGERALD and MURRAY, JJ.

PER CURIAM.

Respondent appeals as of right an order terminating his parental rights to his son and daughter (hereafter “the children”). The trial court found that there was clear and convincing evidence to terminate respondent’s parental rights under MCL 712A.19b(3)(a)(ii) and MCL 712A.19b(3)(g), and that termination was in the best interests of the children. We affirm.

Respondent first argues that the trial court’s determination that termination of his parental rights was in the best interests of the children was clearly erroneous. Specifically, respondent contends that before his parental rights were terminated, he should have been provided with a parent-agency treatment plan so that he could have demonstrated that he is willing and able to care for the children. Further, respondent argues that he should not have been forced to submit to the jurisdiction of the trial court over the children because he was an unadjudicated parent.

“Whether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence.” *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). On appeal, this Court reviews the trial court’s findings regarding a child’s best interests for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). “A finding of fact is clearly erroneous 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.” *Moss*, 301 Mich App at 80.

“If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child’s best interests, the court shall order termination of parental rights.” MCL 712A.19b(5). “In determining whether termination is in a child’s best interests, the court may consider a 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.” *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted).

On appeal, respondent provides very little argument that his continued parental rights are in the children's best interests. Rather, respondent argues that he was never given an opportunity to participate in a parent-agency treatment plan, which would have allowed him an opportunity to demonstrate that he can care and provide for the children. Respondent's argument is meritless; DHS is not required to provide reunification services when termination of parental rights is sought in the initial petition, which was the case here. *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009). Further, respondent stipulated at the bench trial that he had not supported or spent meaningful time with the children since 2012, that he was in arrears on a child support order, and that he was involved in termination of parental rights proceedings involving another child. Based on respondent's stipulations, the trial court asserted jurisdiction over the children and found that there was clear and convincing evidence that the statutory grounds of MCL 712A.19b(3)(a)(ii) and MCL 712A.19b(3)(g) had been established. At that point, the only determination left to be made by the trial court was whether termination of respondent's parental rights was in the children's best interests.

Based on the evidence presented at the termination hearing, a preponderance of the evidence supported the trial court's conclusion that termination of respondent's parental rights was in the children's best interests. Respondent admitted that he made no effort to support, provide for, or even visit the children between August 24, 2012, and the time of the termination hearing in January 2014. Respondent saw the children one time in 2013. For over one year, respondent was not aware that the children were residing with Yolanda Cardwell, the children's aunt. He never visited with the children when they were under the court's jurisdiction. Respondent has been unemployed since early 2012, he has a history of alcohol and marijuana abuse, and he is involved in other termination of rights proceedings. Respondent has demonstrated no parenting ability. In sum, respondent has made no effort to involve himself in the lives of the children, and there was no evidence presented to suggest that he would be willing or able to care for the children in the foreseeable future. Although respondent's father did state that respondent and the children were bonded during the time they lived together, the trial court was free to follow the significant other testimony establishing the opposite. Further, the trial court correctly observed that the children will benefit because of their need for permanence and stability if respondent's parental rights are terminated. The trial court did not clearly err in finding that termination of respondent's parental rights was in the children's best interests.

Respondent also argues that he was a nonadjudicated parent, and that he should not have been forced to submit to the jurisdiction of the trial court because JH, the legal mother of the children, stipulated to the court's assertion of jurisdiction. In support of this assertion, respondent cites the recent case of *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014). *Sanders* is inapplicable to this case. Respondent was not an unadjudicated parent at the time the trial court asserted jurisdiction over the children and held a termination hearing; rather, respondent explicitly stipulated to the court asserting jurisdiction and to statutory grounds for termination. The trial court properly asserted jurisdiction over the children at the bench trial, based on respondent's stipulation.

Respondent next argues that he was denied the effective assistance of counsel at the bench trial. Specifically, respondent contends that his counsel committed a serious error when he stipulated to the trial court's jurisdiction over the children. Respondent argues that if he had

not stipulated, there was insufficient evidence for the trial court to have asserted jurisdiction over the children, and his parental rights would have remained intact.

“[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), overruled on other grounds by *Sanders*, 495 Mich at 422-423. In order to preserve the issue of ineffective assistance of counsel, a timely motion for a new trial raising the issue is required. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). A respondent may also request an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), to make a factual record in support of the claim of ineffective assistance of counsel for appellate review. Respondent did not move for a new trial or a *Ginther* hearing. Accordingly, the issue is not preserved.

“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); see also *CR*, 250 Mich App at 197-198. The trial court’s findings of fact are reviewed for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.* Review of an unpreserved claim of ineffective assistance of counsel is limited to the facts on the existing record. *Wilson*, 242 Mich App at 352.

In the context of child protective proceedings, respondents have a due process right to the effective assistance of counsel. *CR*, 250 Mich App at 197-198. To establish ineffective assistance of counsel, a respondent must show that (1) under prevailing professional norms, counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s error, there is a reasonable probability that the outcome of the trial would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Michigan courts employ a presumption that counsel’s performance is effective, and there is a heavy burden upon a respondent to prove otherwise. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). This Court will not substitute its judgment for that of defense counsel on matters of strategy, nor will it employ the benefit of hindsight to assess the competence of defense counsel. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Respondent’s stipulation at trial did not amount to an error by counsel falling below an objective level of reasonableness. Apparently, respondent’s counsel employed the trial strategy that respondent’s best opportunity to be successful in this matter was to proceed to a hearing regarding the best interests of the children. Accordingly, respondent stipulated to the court’s jurisdiction over the children and to the existence of clear and convincing evidence supporting termination of his parental rights in the context of MCL 712A.19b(3)(a)(ii) and MCL 712A.19b(3)(g). There are valid reasons, based in sound trial strategy, for respondent’s counsel to have pursued this strategy. Based on the evidence that was available to the trial court, it would have quickly become clear that respondent had not been involved in the lives of the children since August 2012; by making his stipulation, respondent avoided extensive testimony

regarding his abandonment of the children and proceeded to a best interest determination, where he could potentially focus on his future ability to care and plan for the children.¹

Even if the counsel erred by allowing respondent to make his stipulation at trial, respondent was not prejudiced. There was overwhelming evidence, all of which was noted above, presented at the termination hearing demonstrating the termination of respondent's parental rights was in the children's best interests. Based on those facts, even if respondent had made no stipulations, the trial court would have had sufficient evidence to assert jurisdiction over the children under MCL 712A.2(b), and to find that termination of respondent's parental rights was in the children's best interests.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray

¹ Ignoring this reasonable strategy, respondent argues that there was an insufficient basis for the court to have asserted jurisdiction over the children without his stipulation, which made the decision to stipulate objectively unreasonable. However, there was ample evidence available to the trial court that respondent had not made any attempts to visit or support the children since August 2012. DHS employees were present at the bench trial and knowledgeable about these circumstances. Because evidence of respondent's abandonment of the children was readily available to the trial court with or without a stipulation, respondent's decision to stipulate was reasonable trial strategy.