

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of AMANDA GRACE WARNER,
Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KRISTI PITONES,

Respondent-Appellant.

UNPUBLISHED
February 16, 2001

No. 228012
Charlevoix Circuit Court
Family Division
LC No. 97-005002-NA

Before: Talbot, P.J., and Sawyer and Markey, JJ.

MEMORANDUM.

Respondent appeals as of right from the family court order terminating her parental rights pursuant to MCL 712A.19b(3)(b)(ii); MSA 27.3178(598.19b)(3)(b)(ii) and (i). We affirm.

Respondent argues that she was denied the effective assistance of counsel. Respondent claims that counsel was deficient for failing to present the court with documentation of her recent surgery which prevented her from traveling from Tennessee to Michigan for the termination hearing, and in failing to move for an adjournment on that basis. Respondent also claims that her attorney failed to call witnesses and offer exhibits.

In proceedings to terminate parental rights, indigent respondents are afforded the right to court-appointed counsel by both our statutes, MCL 712A.17c(5); MSA 27.3178(598.17c)(5), and our court rules, MCR 5.915(B)(1)(b). *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 606; 603 NW2d 824 (1999); *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986). Although the constitutional provisions explicitly guaranteeing the right to counsel apply only in criminal proceedings, the right to due process also indirectly guarantees assistance of counsel in child protective proceedings. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988); *Trowbridge, supra* at 786. The principles of effective assistance of counsel developed in the context of criminal law apply by analogy in termination of parental rights proceedings. *Simon, supra* at 447; *Trowbridge, supra* at 786.

Because respondent did not raise this issue below, our review is limited to errors apparent from the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). See also *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). The only documentation regarding respondent's surgery contained in the lower court file was a copy of respondent's hospital bill and a letter from respondent's attorney, stating that he received a copy of the hospital bill after the hearing. Based upon the lower court record, we cannot conclude that counsel was ineffective for failing to request an adjournment.

On the day of the hearing, counsel referenced the letter sent to the court by respondent, indicating that, as a result of an emergency surgery, respondent was unable to travel. The court acknowledged that it had previously informed counsel that it would consider an adjournment if the court were provided with verification of respondent's condition. Counsel advised respondent of the court's request for verification, but respondent failed to provide the necessary documentation in a timely fashion. On the date of the termination hearing, neither respondent's counsel nor the court had received verification of respondent's medical condition. Counsel stated that he had not filed a motion for an adjournment because he did "not have the requisite proof." This Court will not substitute its judgment for that of a respondent's counsel in matters of trial strategy. *Trowbridge, supra* at 787.

Respondent argues on appeal that she faxed documentation of her surgery to her attorney the night before the termination hearing, but counsel failed to present them to the court. Even if the correspondences between respondent and counsel regarding the time respondent's fax was received at counsel's office were part of the lower court record, respondent cannot establish that she suffered prejudice as a result of any oversight on the part of counsel. The documentation respondent faxed to her attorney, and eventually filed with the court, was a hospital bill indicating that she underwent a surgical procedure on April 13, 2000. The hospital bill did not mention respondent's ability to travel, nor did it contain information about respondent's medical condition. The hospital bill was merely a list of charges incurred, and did not contain any notations by a physician. The court stated on the record that, absent verification of respondent's medical condition, the court would not consider an adjournment. Accordingly, respondent cannot establish prejudice.

Respondent also claims that her counsel was ineffective for failing to call witnesses and offer exhibits into evidence, but she does not indicate the substance of the purported evidence. Decisions regarding the presentation of evidence are matters of trial strategy. The record indicates that counsel cross-examined two witnesses, offered an exhibit into evidence, and made a closing argument. On the basis of the record, we cannot conclude that counsel was ineffective.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Jane E. Markey