# STATE OF MICHIGAN

# COURT OF APPEALS

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In the Matter of BK and SK, Minors.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

LISA KIBBY,

Respondent-Appellant,

and

HAROLD GREEN and DANI R. MALM,

Appellees.

UNPUBLISHED
June 12, 2001

No. 227073
Emmet Circuit Court
Family Division
LC No. 97-004131-NA

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Before: Wilder, P.J., and Hood and Cavanagh, JJ.

PER CURIAM.

Respondent appeals as of right the termination of her parental rights to her minor children, SK (DOB 10/20/87) and BK (DOB 12/11/96), pursuant to MCL 712A.19b(3)(g) [parent, without regard to intent, fails to provide proper care or custody for the child], and (j) [reasonable likelihood of harm if child is returned to parent's home]; MSA 27.3178(598.19b)(3)(g) and (j).[1] We affirm.

On appeal, respondent first argues that she was denied effective assistance of counsel at the termination hearing. The right to due process indirectly guarantees effective assistance of counsel in child protective proceedings. *In re EP*, 234 Mich App 582, 597-598; 595 NW2d 167

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[1] The petition for termination also sought termination under MCL 712A.19b(3)(a)(ii); MSA 27.3178(598.19b)(3)(a)(ii) [parent has deserted the child for 91 or more days and has not sought custody of the child during that period]; however, the family court did not make a finding regarding this subsection and this decision has not been appealed by either party.

(1999). In child protective proceedings, the principles of effective assistance of counsel developed in the criminal law context apply by analogy. *Id*. at 598. To establish a claim of ineffective assistance of counsel, a respondent must show that counsel's performance fell below an objective standard of reasonableness and, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different, thus depriving respondent of a fair trial. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Respondent's ineffective assistance of counsel allegation is threefold; first, respondent argues that she received ineffective assistance as a consequence of her counsel's evidentiary and witness presentation decisions. We disagree. After a thorough review of the record, we find that respondent's counsel's performance with regard to evidentiary and witness presentation decisions cannot be deemed objectively unreasonable. See *People v Rockey*, 237 Mich App 74, 78; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy and decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Id*. at 76; *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Respondent also claims that she was denied the effective assistance of counsel because respondent was absent from both review hearings and, although her counsel moved for a continuance prior to the hearing, he failed to move for a continuance at the conclusion of proofs. Respondent has failed to cite any supporting authority for her claim. Respondent may not merely announce her position and leave it to this Court to discover and rationalize the basis for her claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Therefore, this issue is not properly presented for appellate review. *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998).

Next, respondent argues that she received ineffective assistance as a consequence of her counsel's failure to raise, investigate, and/or pursue the application of the Indian Child Welfare Act of 1978 (ICWA), 25 USC 1901 *et seq*. to the proceeding. See also MCR 5.980. To overcome the presumption of effective assistance, respondent must show that her counsel failed to perform an essential duty and that the failure was prejudicial to respondent. See *People v Laidlaw*, 169 Mich App 84, 96; 425 NW2d 738 (1988). In addition, counsel has a duty to advocate their client's cause and to reasonably investigate the law and facts of the case. See *Strickland v Washington*, 466 US 668, 688, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Further, since respondent failed to preserve this issue below by way of a motion for a new trial or *Ginther*[2] hearing, our review of this issue is limited to errors apparent on the record. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). On the record, we find no error to support respondent's claim of ineffective assistance of counsel. We further find that even if counsel failed to investigate the applicability of the ICWA, respondent's ineffective assistance claim still must fail because she has not shown that she was prejudiced by her counsel's errors. *Laidlaw*,

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

*supra*; *Stanaway*, *supra*.

The ICWA requires that specific federal procedures and standards be applied to child custody proceedings involving termination of parental rights to an Indian child. Most relevant with regard to this matter are the following provisions of 25 USC 1912, in pertinent part:

> (a) In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child[3] is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior[4]] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. [25 USC 1912(a).]

See also MCR 5.980(A)(2). At the preliminary hearing held on April 22, 1999, the referee had the following colloquy with respondent:

> *The Referee:* Are either of your children eligible for membership in an American Indian Tribe or Band?
>
> * * *
>
> *Ms. Kibby:* I know I have a lot of Indian in me. I don't know.
>
> *The Referee:* Ok. I am going to go ahead and put that down to be researched.

As a result of this discussion, the referee, in an order dated April 22, 1999, directed the FIA to investigate and pursue this claim. Here, the record clearly establishes that the FIA complied with this order. In a June 16, 1999 letter[5] to respondent's counsel, Phil Dickinson[6] indicated to

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[3]An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 USC 1903(4).

[4] See 25 USC 1903(11).

[5] This letter, filed with the trial court on June 17, 1999 and attached as an exhibit to respondent's brief on appeal, does not appear in the lower court record provided to this Court on appeal. Nevertheless, it is apparent from the "Received and Filed" stamp affixed to the document that it is part of the record. Because the document is not in the record provided to us, it is likely contained in the "social" file historically utilized by the juvenile court to maintain confidential information separate from the "legal" file that contains all pleadings and other filings in a particular case. MCR 7. 210(A)(1) states that "the record consists of the original papers filed in [the lower] court." Accordingly, the letter is properly considered by this Court on appeal. See also Michigan Court of Appeals IOP 7.210(A).

respondent's counsel, and the court, that the FIA immediately began to investigate this claim on April 23, 1999, but that respondent did not respond to its inquiries until June 2, 1999. In addition, after forwarding the information provided by respondent to the Bureau of Indian Affairs (BIA), the BIA informed the FIA that more information was required. The letter went on to state that respondent's cooperation was needed in order to continue to research the issue and requested counsel's help in obtaining the necessary information from respondent.

While respondent's affidavit in support of her ineffective assistance claim maintains that counsel never contacted her regarding the information the FIA was seeking, her affidavit does not establish that Dickinson did not further inquire about this needed information directly from respondent at the June 29, 1999 plea hearing at which respondent, counsel, and Dickinson were all present. Further, the record indicates that respondent left town in July, 1999, was not available to be reached by FIA in connection with implementing the parent-agency agreement, and did not return until two weeks prior to the February 24, 2000 termination hearing. Therefore, respondent's extended absence from the area indicates not only her failure to cooperate with FIA, but also the difficulty counsel would have in obtaining this additional information regarding the children's possible membership in an Indian Tribe from respondent.[7]

Under the facts presented, we find that because petitioner complied with the notice requirements of the ICWA, § 1912(a); MCR 5.980(A)(2);[8] and because the record shows respondent failed to maintain contact with the FIA, left town, missed two review hearings, and did not return until just prior to the termination hearing, it is not apparent from the record that respondent's counsel failed to perform an essential duty in representing respondent. Further, even if counsel was ineffective, respondent's lack of cooperation with the FIA and counsel precludes a finding that counsel's alleged failure to perform his duty caused her prejudice. Therefore, respondent has failed to establish her ineffective assistance claim. *Strickland*, *supra*; *Laidlaw*, *supra*; *Stanaway*, *supra*.

Respondent next argues that the family court erred in terminating her parental rights pursuant to MCL 712A.19b; MSA 27.3178(598.19b) because petitioner failed to establish by

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(…continued)

[6] Dickinson was the Children's Protective Service Worker initially assigned by the FIA to handle respondent's case.

[7] The dissent is correct that we cannot conclusively determine that Dickinson requested this information from respondent at the plea hearing, or that counsel was not able to contact respondent during her absence from the geographical area. However, we note again that because respondent has not preserved her claim of ineffective assistance of counsel, effective assistance of counsel is presumed and *respondent* has the burden of persuading us from evidence on the record that her counsel was ineffective. *Laidlaw*, *supra*.

[8] See also *In re TM*, ___ Mich App ___; ___ NW2d ___ (Docket No. 220650, issued March 31, 2001) slip op p 4. We note that even though respondent indicated on the certification request form that her children may be members of either the Blackfoot or Apache tribe, respondent also placed a question mark next to this answer. Thus, the FIA had no way of determining if the children were members of either tribe and therefore correctly notified the BIA, as required by the ICWA.

clear and convincing evidence one of the statutory grounds for termination and, alternatively, that termination of respondent's rights, was clearly not in the best interest of the children. We disagree.

Upon review of the entire record, we find that the family court did not clearly err in finding that statutory grounds for termination were established by clear and convincing evidence. MCL 5.974(I); *In re Trejo Minors*, 462 Mich 341, 350; 612 NW2d 407 (2000); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (199). This Court's review of a trial court's factual findings in an order terminating parental rights is for clear error. MCR 5.974(I); *In re Miller*, *supra* at 337; *In re Vasquez*, 199 Mich App 44, 51; 501 NW2d 231 (1993). A finding of fact is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Miller*, *supra*. Deference must be accorded to the trial court's assessment of the credibility of the witnesses before it. MCR 2.613(C); *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991). Once the trial court finds a statutory ground for termination by clear and convincing evidence, the court must terminate parental rights unless it finds, based on the whole record, that termination is clearly not in the best interests of the children. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Trejo Minors*, *supra* at 350; *In re Maynard*, 233 Mich App 438, 450-451; 592 NW2d 751 (1999).

The record in this case clearly establishes that respondent failed to provide proper care or custody for her children and that, considering the age of the children, there is no reasonable expectation that she will be able to provide proper care or custody within a reasonable time. Since the late 1990s, respondent has been unable to provide for her children, on a consistent basis, for any meaningful period of time. In addition, the record reflects a serious inability of respondent to maintain a sober lifestyle, even though she has had significant outpatient treatment and two inpatient rehabilitation opportunities. Further, the evidence established that respondent failed to maintain employment or visits with her children, did not complete parenting classes or therapy, and lost contact with the FIA from July 1999 to February 2000, thus missing both review hearings. Based on this evidence, we agree with the family court that there was clear and convincing evidence that respondent, without regard to intent, has failed to provide proper care or custody to her children. Accordingly, termination of her parental rights under subsection 19b(3)(g) was proper.[9]

Further, the family court's assessment of the best interests of the children was not clearly erroneous. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Trejo Minors*, *supra*. The record clearly indicates that respondent has a difficult time remaining sober, that she visited with the children only a handful of times, and that the children have been, and would continue to be, emotionally damaged from contact with respondent. Accordingly, we are not left with a definite and firm conviction that the family court erred when it determined that termination was clearly

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[9] Because the family court properly terminated appellant's parental rights under subsection 19b(3)(g) and only one statutory ground for termination must be established in order to terminate parental rights, we need not decide whether termination was also proper under subsection 19b(3)(j). *In re Trejo Minors*, *supra* at 350.

not in the best interest of respondent's children. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Miller*, *supra*; *In re Trejo Minors*, *supra*; *In re Maynard*, *supra*.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Harold Hood