STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of T.B., T.M. and S.M., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

BERNICE CLARK and JAMES BOKELMANN,

Respondents-Appellants,

and

JOSEPH MEADOWS,

Respondent.

UNPUBLISHED
December 10, 2002

No. 241700
Kent Circuit Court
Family Division
LC No. 95-001258-NA

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

PER CURIAM.

Respondents appeal as of right the trial court's order terminating their parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i), (c)(ii) and (g). We affirm.

I

Respondent Clark argues that she was denied the effective assistance of counsel because her attorney at the termination hearing did not object to hearsay testimony regarding her positive drug test, two terminations from her jobs, and her decision to take her son off a prescribed medication. In analyzing claims of ineffective assistance of counsel at a termination hearing, 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). A criminal defendant claiming ineffective assistance of counsel must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). First, the defendant must show that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). This requires overcoming the strong presumption that counsel's performance was sound

trial strategy. *Id.* Next, the defendant must show that the deficient performance prejudiced the defense, which requires a showing of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. *Id.*; see also *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Respondent Clark's argument misconstrues the admissibility of hearsay evidence at a dispositional hearing in a child protective proceeding. At the adjudicative hearing, when the trial court determines whether it has jurisdiction over the minors, the petitioner may use only legally admissible evidence to prove the grounds for jurisdiction. MCR 5.972(C)(1); *In re Gilliam*, 241 Mich App 133, 136-137; 613 NW2d 748 (2000); *In re Snyder*, 223 Mich App 85, 88-89; 566 NW2d 18 (1997). However, at a termination hearing involving the disposition of minors already under the court's jurisdiction, the court may consider hearsay evidence if the evidence relates to matters already established at the adjudicative stage, provided the evidence is relevant and material. MCR 5.973(F)(2); *In re Gilliam, supra*; *In re Snyder, supra*. Legally admissible evidence is required only when termination is sought on the basis of a circumstance that was not previously established at the adjudicative stage. MCR 5.974(E)1); *In re Gilliam, supra*.

Here, evidence that respondent Clark tested positive for drug use in May 2001, was related to the allegations in the original petition that she left her children unsupervised while she was under the influence of drugs. Evidence that she was fired from jobs because of embezzlement and absenteeism was also related to the allegations in the petition that the family was homeless. Because the trial court originally asserted jurisdiction over the children on the basis of Clark's drug use and failure to provide a stable home, it was not improper to elicit hearsay testimony on these matters.

We agree, however, that jurisdiction was not established on the basis of Clark's failure to provide the children with proper medical care. Accordingly, legally admissible evidence was required to prove that she had taken her son off the prescription drug without a doctor's approval, and that she lied to her caseworker when she said that her son's therapist had approved this. However, Clark's own statements about having a doctor's approval were not hearsay because they were admissions by a party opponent. MRE 801(d)(2). While England's testimony about Scholten's statements were hearsay, the error arising from the admission of this evidence was harmless because Scholten had already testified that she did not advise Clark to stop giving her child the medication.

Because admission of the challenged testimony was either proper or nonprejudicial, respondent Clark cannot prevail on her claim that counsel was ineffective.

II

Respondent Clark also argues that termination of her parental rights was not in the children's best interests. Once a petitioner establishes by clear and convincing evidence that a statutory basis for termination exists, the court must order termination of parental rights unless it finds from the evidence on the record that termination is clearly not in the child's best interests. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000). This Court reviews the court's decision for clear error. *Id.* at 356-357.

Although the children were bonded with Clark, the trial court properly found that this was not sufficient to show that termination was clearly not in their best interests. Similarly, the fact that the children were bonded with their great-grandparents did not establish that termination of respondent's parental rights was clearly contrary to the children's best interests. We find no clear error in the trial court's determination that termination of respondent's parental rights was not clearly contrary to the children's best interests.

III

Respondent Bokelmann argues that the trial court erred in finding statutory grounds to terminate his parental rights. We disagree. In view of the evidence that Bokelmann's past conduct created a serious, traumatizing breach between himself and his son, and that his efforts to repair the breach were too little and too late to rectify the situation within a reasonable time, the court did not clearly err in finding that termination was warranted under MCL 712A.19b(3)(c)(ii) and (g).

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Michael J. Talbot