

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of DALE'NISHA BETTY JEAN
FRAZIER, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JEANINE FISHER,

Respondent-Appellant.

UNPUBLISHED

December 20, 2007

No. 279530

Genesee Circuit Court

Family Division

LC No. 01-113958-NA

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(i), (g), (i), and (j). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Respondent does not challenge the sufficiency of the evidence or the trial court's ultimate decision to terminate her parental rights. Rather, she contends that she is entitled to a new hearing due to ineffective assistance of counsel. Specifically, she contends that petitioner did not reasonably accommodate her disabilities as required under the Americans with Disabilities Act, 42 USC 12101 *et seq.*, and that counsel was ineffective for failing to raise the issue during the proceedings.

A respondent has a right to the effective assistance of counsel in child protective proceedings. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002). "[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." *In re EP*, 234 Mich App 582, 598; 595 NW2d 167 (1999), overruled in part on other grounds by *In re Trejo*, 462 Mich 341, 353 n 10; 612 NW2d 407 (2000). But because respondent failed to raise this issue below in a motion for a new trial or request for an evidentiary hearing, our review is limited to mistakes apparent from the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To

demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff'd* 468 Mich 233 (2003) (citations omitted).]

Respondent has failed to identify the rights specifically granted her by the ADA and to show that any rights she may have had under the ADA were violated by petitioner during the pendency of the proceedings. In addition, this Court has held that a claim alleging a violation of the ADA "must be raised in a timely manner . . . so that any reasonable accommodations can be made." *In re Terry*, 240 Mich App 14, 26; 610 NW2d 563 (2000). Thus, the claim should be raised when the service plan is adopted or shortly thereafter so that the court may address it; waiting until after a termination hearing is too late. *Id.* Here, the record discloses that counsel did not raise an ADA issue at the April 24, 2007, pretrial hearing or at the June 13, 2007, termination hearing. Respondent has not shown that counsel otherwise failed to raise a cognizable ADA issue in a timely manner under *Terry*. Thus, respondent has not met her burden of establishing the requisite factual predicate for her claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Further, there is nothing in the record to suggest that respondent was denied services available to parents without her disabilities or that the agency failed to accommodate her disabilities in rendering services. The agency repeatedly referred respondent for psychological and psychiatric evaluations to determine the extent of her problems and to obtain recommendations for services that might be rendered to facilitate reunification, but respondent refused to attend. In the meantime, the agency provided other services, such as counseling, parenting classes, and domestic violence classes. Thus, the record shows that petitioner did attempt to determine what type of services would be most appropriate for respondent and made reasonable efforts to reunite the family.

Accordingly, respondent has failed to show that counsel was ineffective for failing to assert respondent's rights under the ADA. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder