

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of DESMOND RAYMOND WADE
and DEMITRIUS EDDIE WADE, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

RONALD WADE,

Respondent-Appellant.

UNPUBLISHED

August 21, 2008

No. 283902

Oakland Circuit Court

Family Division

LC No. 06-724963-NA

Before: Schuette, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating his parental rights to the minor children under MCL 712A.19b(3)(g), (h), and (j). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, respondent argues only that his trial counsel was ineffective in failing to advocate for respondent's opportunity to propose an alternate custodian for the children while he was incarcerated, which may have caused an outcome different than termination of his parental rights.

Respondent was incarcerated for the murder of the children's mother and would remain so for the duration of their childhoods absent successful appeal of his conviction. When respondent became imprisoned the four-year-old twins were placed under a joint guardianship with respondent's adult daughter and the maternal grandparents, between whom existed great animosity, as evidenced by appeal of the guardianship order and allegations of abuse, neglect, and misconduct against one another. During this child protective proceeding, the trial court was aware that both parties sought the children's custody.

Respondent did not assert a claim of ineffective assistance of counsel in the trial court, but raises it for the first time on appeal. A claim of ineffective assistance of counsel should be raised by moving for a new trial or an evidentiary hearing, but it may be raised for the first time on appeal if the details relating to the alleged ineffective assistance of counsel are sufficiently contained in the record to permit this Court to decide the issue. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Cicotte*, 133 Mich App 630, 636; 349 NW2d 167 (1984).

In the absence of an evidentiary hearing in the trial court, review on appeal is limited to mistakes apparent on the lower court record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The right to due process indirectly guaranteed respondent assistance of counsel in this child protective proceeding. *Reist v Bay Circuit Judge*, 396 Mich 326, 349; 241 NW2d 55 (1976). The right to counsel means the right to effective counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel, respondent is required to show: (1) that his attorney's performance was prejudicially deficient, and (2) that under an objective standard of reasonableness, the attorney made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052, 80 L Ed2d 674 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

The evidence showed that counsel's failure to advocate for respondent's opportunity to propose an alternate custodian for the children while he was incarcerated did not constitute error and did not prejudicially affect the outcome of respondent's child protective proceeding. Respondent was not asked by his counsel to state his proposed plan for the children, but he was asked by counsel for petitioner and was unable to articulate a plan other than his original one for placement with his adult daughter or the maternal grandparents. On appeal, respondent does not state in his brief any other alternate plan.

In addition, the outcome of the proceeding was not prejudiced by counsel's failure to advocate for respondent's opportunity to propose alternate custody for the children. The trial court was well aware that two competing parties were available and vying for custody of the children and did not need counsel or respondent to reiterate that fact. The trial court terminated respondent's parental rights despite the fact that alternate custody had been proposed, which was necessary to prevent respondent's interference from prison with the children's placement and the continual competition for custody between relatives, and so that the children might experience the opportunity for one stable home. Providing respondent an opportunity to name more proposed caretakers would not have affected the trial court's decision. Given the absence of error or prejudicial effect on the outcome of the proceeding, respondent was not denied effective assistance of counsel.

Affirmed.

/s/ Bill Schuette
/s/ Brian K. Zahra
/s/ Donald S. Owens