STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KAREEN WHITLOCK and RICHARD HARCUS, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ROY H. HARCUS,

Respondent-Appellant,

and

NANCY L. HARCUS,

Respondent.

UNPUBLISHED
March 23, 2001

No. 227552
Tuscola Circuit Court
Family Division
LC No. 98-007112-NA

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

NANCY L. HARCUS,

Respondent-Appellant,

and

ROY H. HARCUS,

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Respondent.

Before: Bandstra, C.J., and Griffin and Collins, JJ.

PER CURIUM.

Respondents appeal as of right from a family court order terminating their parental rights to the minor children under MCL 712A.19b(3)(c)(i), (g) and (j); MSA 27.3178(598.19b)(3)(c)(i), (g) and (j). We affirm.

Respondent-father contends that the court abused its discretion when it allowed the attorney for the minor children to qualify Joann Bowman as an expert witness, even though she was not identified as an expert. We disagree. Bowman was named as a witness, but not as an expert. She was qualified as an expert to answer one question. Generally, the decision to allow testimony from an unlisted expert is within the discretion of the court. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992). Further, in termination cases, a court may question or call a witness if at any time it believes that the evidence has not been fully developed, thus showing that the court in a termination case is given broader discretion in the witnesses before it than in a civil case. See MCR 5.923(A); *In re Alton*, 203 Mich App 405, 407; 513 NW2d 162 (1994). We see no abuse of discretion in qualifying a fact witness to give expert testimony on a single limited issue when the area of examination could have reasonably been anticipated by respondent-father. In any event, Bowman's expert testimony was cumulative to other testimony properly received. Respondent-father was not prejudiced by the limited testimony.

Both respondents argue that they were denied the effective assistance of counsel because the courtroom where the termination hearing was held was cramped and limited the amount of work space for the attorneys and hindered the attorneys' ability to confer with respondents during the hearing. This Court has applied the test for ineffective assistance of counsel in criminal matters to termination proceedings. *In re Rogers*, 160 Mich App 500, 502; 409 NW2d 486 (1987). In "normal" claims of ineffective assistance of counsel, each respondent must show that their counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the respondents that they were denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, respondents must also show that there is a reasonable probability that, but for the cramped conditions of the courtroom, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). However, the full range of claims of denial of counsel run along the continuum "from actual to constructive denial of counsel to instances where the performance of counsel is so deficient that there has been a functional denial of counsel guaranteed by the Sixth Amendment." *People v Mitchell*, 454 Mich 145, 153; 560 NW2d 600 (1997). Regardless of the nature of the claim of denial of counsel, the burden is on respondents to produce factual support for their claims of ineffective assistance of counsel. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *Mitchell, supra* at 161-162 (court would not presume a denial of counsel solely from fact that attorney was suspended for thirty days during the course of trial).

Respondents' argument is that the court's dimensions prevented consultation between respondents and their attorneys, thus impeding respondents' right to counsel and the right to consult with counsel. While the courtroom offered limited space for the attorneys to work in close proximity to their clients, the record does not support respondents' claims that the accommodations affected their attorneys' performances. Indeed, the court allowed for breaks when the attorneys wanted to confer with respondents. Despite the fact that the accommodations were less than ideal, the record does not support a conclusion that respondents' attorneys' performance was affected, or that respondents were prejudiced by the conditions in the courtroom.

Respondent-mother argues that the trial court erred when it refused to appoint an expert to perform an independent psychological evaluation. A claim for examination by an independent expert must be accompanied by a showing that the appointment of the independent expert is necessary; this may be accomplished by a showing that the petitioner's experts were biased or prejudiced against the respondent or by disputing with particularity the opinions and recommendations of the expert. *In the Matter of Bell*, 138 Mich App 184, 187-188; 360 NW2d 868 (1984). In addition, the respondent must show that an independent expert would testify favorably to respondent. *Id*. Respondent-mother satisfied none of these requirements. Although respondent-mother claimed that the prior psychological evaluation was invalid, she failed to provide factual support for her argument. While she contends that the evaluation was "stale" because it was conducted over a year before the termination proceeding, there is no indication in the record that there was any change in circumstances during the year. She did not adequately explain why the prior evaluation was invalid or why another evaluation was reasonably likely to be different. Nor is there anything inherent in the prior evaluation to indicate that it was inaccurate, or that the person who performed it was biased or prejudiced against respondent-mother. The trial court did not abuse its discretion when it refused to appoint another expert. *Id*.

We likewise find no merit to respondent-mother's argument that the trial court failed to comply with MCR 5.973(B)(5), and that all updated service plans and court reports should have been stricken from the record as a result. Respondent-mother correctly argues that MCR 5.973(B)(5) requires that reports prepared for dispositional review hearings shall be offered into evidence. However, respondent-mother should have objected at the time of each of the dispositional review hearings if she believed that the court rule was not being followed with respect to the formal admission of the court reports. To properly preserve an issue, a party must make both a timely and specific objection. MRE 103(a)(1); *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). We agree with the trial court that raising such an objection or moving to strike the reports from the record at the time of the termination proceedings was untimely, particularly when the trial court had already reviewed and relied upon those reports throughout the history of the case. Further, even if an objection during the earlier proceedings was unnecessary, the court may consider all relevant and material evidence during a termination proceeding without regard to whether it was properly entered into evidence at earlier hearings. *Matter of King*, 186 Mich App 458, 465; 465 NW2d 1 (1990). We see no error in the court's considering these reports.

Respondents also challenge the merits of the court's decision to terminate rights, arguing both that the court clearly erred in finding that the grounds for termination had been proven and

that it was in the best interests of the children to terminate respondents' rights. We disagree. In a termination hearing, the petitioner bears the burden of showing by clear and convincing evidence a statutory basis for termination. MCR 5.974(F)(3). Once a statutory basis for termination is shown, the trial court shall terminate parental rights unless it finds that termination of parental rights is clearly not in the child's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000). This Court reviews the trial court's decision for clear error. MCR 5.974(I); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). "A finding is 'clearly erroneous' [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id*., quoting *In re Riffe*, 147 Mich App 658, 671; 382 NW2d 842 (1985).

The children in this case came under the jurisdiction of the court in October 1998 after they had been unable to maintain stable and adequate housing for over two years. Workers visiting the facilities where the family stayed testified that there was a strong smell of urine in the homes. Caseworkers attempted to work with the family to obtain housing and to provide more appropriate care for the children. However, respondents made only a minimal effort to find housing. The family's hygiene was so poor that school officials provided materials so the children could clean themselves when they came to school. Although petitioner attempted to work with respondents to gain adequate parenting skills, respondents did not cooperate. At one point, respondents moved from Tuscola County to Detroit while the children remained in foster care in Tuscola County. Respondents then stopped visiting with the children on a regular basis. Respondent-father stopped cooperating altogether with the caseworker, while respondent-mother failed to make or keep appointments for services.

The court did not err in finding that the statutory grounds for termination of the parental rights of both respondents were established by clear and convincing evidence. MCR 5.974(I); *Miller, supra* at 337. Neither respondent made any significant progress in meeting the requirements of their treatment plans. Respondents were also offered reasonable assistance by petitioner to address the goals of their treatment plans, but failed to follow through with the services offered to them. Services were even offered to respondents after they relocated to Detroit; respondents did not take advantage of the services. Their failure to comply with the parent/agency agreement justified the conclusion the conditions that led to the original adjudication continued to exist and that there was no reasonable likelihood that the conditions would be rectified within a reasonable time. See MCL 712A.19b(3)(c)(i); MSA 27.3178(598.19b)(3)(c)(i); *In re Jackson*, 199 Mich App 22, 27; 501 NW2d 182 (1992) (partial noncompliance with parent/agency agreement may support termination). In addition, the evidence supported a conclusion that respondents, without regard to intent, failed to provide proper care and custody for the children and that there was no reasonable expectation that the parent would be able to provide proper care and custody within a reasonable time. MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g).

Both respondents argue that petitioner failed in some way in its duty to them. We disagree. Contrary to what respondent-father argues, he was not ignored by petitioner. Rather, the evidence showed that he failed to participate in the services or treatment plan offered to him. Even if respondent-mother had a dependent personality disorder, it was not up to the caseworker to arrange for her appointments for services. The responsibility was on respondent-mother to

follow through with the services that she was offered. Finally, the caseworker did not act unreasonably by not inspecting respondents' home in Detroit when respondent-mother had advised the caseworker throughout that the home was not yet suitable for the children and needed additional work. There was no point in requiring that the caseworker inspect that house when it was never established that the home was ready for the children.

There is no merit to respondent-father's argument that petitioner was required to prove culpable or intentional neglect of the children. The current version of MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g), by its terms, does not require culpable or intentional neglect. Termination of respondents' parental rights under all three statutory grounds was proven by clear and convincing evidence.

Finally, the evidence did not establish that termination of respondents' parental rights was clearly not in the children's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *Trejo, supra* at 354. The trial court did not err in terminating respondents' parental rights to the children. *Id*. at 364.

We affirm.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Jeffrey G. Collins