STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of RODNEY ALLEN MELSON, III, and ROZWELL GUY HARRIS, II, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KRISTINA RIHTAR-MELSON, a/k/a KRISTINA RIHTAR, a/k/a KRISTINA MELSON,

Respondent-Appellant,

and

RODNEY ALLEN MELSON, II,

Respondent.

UNPUBLISHED
October 28, 2004

No. 254200
Muskegon Circuit Court
Family Division
LC No. 03-031554-NA

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FAMILY INDEPENDENCE AGENCY,

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RODNEY ALLEN MELSON, II,

Respondent-Appellant,

and

KRISTINA RIHTAR-MELSON, a/k/a KRISTINA RIHTAR, a/k/a KRISTINA MELSON,

Respondent.

No. 254714
Muskegon Circuit Court
Family Division
LC No. 03-031554-NA

Before: Neff, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right the trial court's order terminating their parental rights to the minor children pursuant to MCL 712A.19b(3)(g) (neglect) and (j) (reasonable likelihood of harm if returned to the parent's home). We affirm.

I

Child protective proceedings were initiated in this case on January 30, 2003, charging neglect, criminality, and a prior protective services history on the part of respondent-mother. At the time, both respondents were in jail. At an adjudication hearing on March 20, 2003, both respondents pleaded no contest to an amended petition charging that they were arrested on felony warrants on January 30, 2002, for fraud and counterfeiting. Both respondents were on probation for uttering and publishing and had failed to meet their probation requirements. Respondents' arrest stemmed from an incident in which respondent-father wrote a check on a woman's account and respondent-mother cashed it. Respondent-mother was also charged with embezzlement from K-Mart, where she worked. Respondent-father faced charges as a fourth-felony offender. The family home was extremely cluttered and had spoiled food out in the home.

At the March hearing, petitioner argued that the children should remain in foster care because having the children in their custody would increase the risk of flight by respondents given the serious criminal charges they faced and respondent-father's likelihood of a prison sentence. Finding no substantial risk of harm, the court returned the children to their parents' home However, the court's March 25, 2003 disposition order prohibited respondents from removing the children from the state without prior written approval of the court.

At the June 13, 2003, review hearing, reports concerning the respondents' progress were positive. Over the course of the next few months, however, respondents' legal encounters did not abate. By the September 5, 2003, review hearing, the Family Independence Agency (FIA) reported that it had lost contact with respondents. Their whereabouts were unknown. Neither respondent was present at the hearing. The prosecutor stated that respondents had failed to appear for trial in Muskegon, had apparently left the county, and now faced additional criminal charges in Kalamazoo County. There were outstanding warrants for their arrest. Petitioner sought court authorization of a "pick-up" order for the children because of its concern for their safety and well-being. Counsel for respondent-mother and respondent-father each stated that they took no position on the pick-up order. The court authorized the pick-up order.

Approximately one hour after the hearing concluded, the court went back on the record, stating that respondent mother had since appeared. At the outset of the hearing, the prosecutor indicated that respondent-mother had expressed objection being represented by attorney Smedley, who was substituting for her appointed counsel that day. The prosecutor stated that he had no objection to an adjournment, but would like respondent-mother to testify concerning the

whereabouts of the children. The court permitted attorney Smedley "to withdraw" and proceeded to take testimony from respondent-mother.[1]

Respondent-mother testified that respondents and the children were living in a motel in Kalamazoo. They were currently with a person at her church named Lisa, but she did not know her last name. She stated that respondent-father was in the hospital following surgery, and that the children were fine. She claimed that she had spoken with the FIA worker in the past two weeks, and had offered to bring the children in so that the FIA could confirm their well-being. According to respondent-mother, she did not fail to appear for trial in Muskegon, and she was waiting for a new court-appointed attorney. She stated that respondents were each being charged with extortion in Kalamazoo.

The prosecutor reiterated his request to take the children into custody, given respondents' additional criminal charges, their transient living conditions, their move to Kalamazoo, and their failure to maintain contact with the FIA. Moreover, the children were being left with someone whose last name was unknown. Counsel for respondent-father argued strongly against the removal of the children from respondents' care.

After verifying with court officials that respondent-mother was scheduled for trial in Muskegon in four days and questioning respondent mother concerning arrangements for the children's care should she be incarcerated, hearing additional argument from counsel, the court again authorized the pick-up order for the children. The court noted that it earlier returned the children to the parents finding no substantial risk of harm. At that time respondent-father was charged with uttering and publishing, and habitual offender fourth, and respondent-mother was charged with uttering and publishing, embezzlement, habitual offender second, and a probation violation. The court stated that since that time, however, respondents were each charged with an additional felony, they were living in a motel, and that there was now concern for the children's safety.

On October 14, 2003, the court held an emergency review hearing and ordered the children placed in foster care. The prosecutor reported that respondent-mother had not appeared for trial following the September 5 hearing and that respondents had apparently left the state with the children. Respondents now faced additional criminal charges or had outstanding warrants in a number of jurisdictions, including charges in Virginia. Respondents wrecked their car in Colorado, prompting an investigation by Colorado police. The children were taken into custody by Colorado officials and subsequently released to the children's Michigan FIA caseworker, who flew to Colorado to pick up the children. The prosecutor indicated that the FIA would now most likely be seeking termination of respondents' parental rights.

Following a trial on February 4 and 5, 2004, in which the court heard testimony from Michigan and Colorado officials as well as both respondents, the court issued an order terminating respondents' rights, in large part based on respondents' chronic criminality and their

[1] The record indicates that attorney Smedley remained present during the proceedings, but did not participate on behalf of respondent mother.

resulting failure to properly care for or provide for the care of their children. According to testimony, when respondents were questioned in Colorado following their auto accident, respondents gave several false names and respondent-mother denied any involvement with protective services. The Colorado child welfare worker described the children as filthy when they were taken into custody.

Respondent-mother testified that she was currently in the Muskegon County jail. She denied that respondents were not forthcoming with Colorado officials. Respondent-father was currently incarcerated in Kalamazoo, awaiting sentencing. He pleaded guilty to extortion, and his probation was revoked for two charges of uttering and publishing. He was scheduled for trial in Muskegon County on uttering and publishing and other charges. Respondents claimed that they left the state because they did not want their children returned to foster care because they had previously sustained bruises while in foster care.

II

Respondents argue that the trial court erred in terminating their parental rights pursuant to subsections 3(g) and (j) and erred in failing to find that termination was clearly not in the children's best interests. We find no error.

A

Termination of parental rights is appropriate where petitioner proves by clear and convincing evidence at least one ground for termination. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). Once this has occurred, the court shall terminate parental rights unless it finds that the termination is clearly not in the best interests of the children. *Id.* at 353.

This Court reviews the lower court's findings under the clearly erroneous standard. *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been made, giving due regard to the trial court's special opportunity to judge the credibility of the witnesses. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The trial court's decision on the best interests question is reviewed for clear error. *In re Trejo, supra* at 356-357.

B

As noted, the trial court found "the parties' chronic criminality," a significant factor in termination. The court stated that respondents showed "a disregard for the basic conventions of leading a civilized life style as law abiding citizens." Their inability to live crime-free "caused them to lose habitats and jobs and has endangered their children." Further, they made "no appreciable effort to provide the children with proper care" while incarcerated, having failed to provide the FIA with sufficient information regarding possible relative placements.

We find no clear error in the trial court's determinations. Incarceration and criminal activity may properly be considered in deciding whether petitioner met its burden under subsections (g) and (j). See, e.g., *In re Perry*, 193 Mich App 648, 650-651; 484 NW2d 768 (1992). In *In re Kidder (On Remand)*, 61 Mich App 451, 453; 233 NW2d 495 (1975), the panel found incarceration alone insufficient to terminate parental rights, but sufficient when combined with other circumstances showing parental unfitness. In the present case, the trial court also

considered the effects of the respondents' criminal behavior and incarceration on the children. Other evidence showed environmental neglect and problems with the children's development while in respondents' care. The trial court found respondents not credible concerning their explanations for their circumstances. We find no basis for rejecting the court's credibility determinations or its weighing of the evidence.

Respondents' arguments on the best interests issue are cursory (respondent-mother) or unconvincing (respondent-father). Our consideration of these arguments and the record does not persuade us that the court clearly erred in failing to find that termination was not in the children's best interests. *In re Trejo, supra* at 356-357.

III

Respondent-mother argues that she was denied the effective assistance of counsel at the permanent wardship trial. She contends that she was entitled to representation by an experienced attorney, such as her appointed counsel of record, rather than allegedly inexperienced substitute counsel. We find no error requiring reversal.

Whether a respondent is denied the effective assistance of counsel is a constitutional question of law subject to review de novo. *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2002). The right to counsel applies in child protective proceedings and thus the principles of effective assistance of counsel developed in criminal law apply by analogy. MCR 3.915(B)(1); *In re CR, supra* at 197-198. To establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 198.

Many of the arguments made by respondent-mother are clearly devoid of merit. Respondent-mother cites no authority, nor have we found supporting authority, for her apparent position that she has the right to have a specific attorney representing her at every hearing, or that the court must ask her permission before accepting a different attorney as a stand-in for the court-appointed attorney. A litigant may not merely announce her position and leave it to the appellate court to discover and rationalize the basis for her claims. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Moreover, the statements in respondent mother's brief that she never met attorney Catalino before trial, and that she asked him to do certain things, are not part of the record below. Because respondent-mother did not raise her ineffective assistance claim below, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Further, inexperience alone will not support a claim for ineffective assistance of counsel. See *People v Kevorkian*, 248 Mich App 373, 415; 639 NW2d 291 (2001).

Respondent mother also claims that her attorney was ineffective because he waited until three witnesses had testified before moving to adjourn. We disagree. Both respondents had moved to adjourn before trial; the motion was discussed in chambers and was merely being summarized for the record. Attorney Catalino gave cogent reasons for seeking an adjournment: to allow the FIA additional time to investigate potential guardians and to await sentencing in

Muskegon County. The court stated that it would entertain another motion to adjourn before its decision if, after the evidence was presented, counsel believed the children would benefit from a delay. No such motion was made; however, there is no indication that had it been made, it would have been granted or changed the outcome.

Respondent-mother also assails attorney Catalino's performance by charging that he repeatedly asked questions to which he did not know the answers. Respondent has failed to show that the questions were not purposeful efforts by counsel to establish certain evidence and therefore trial strategy. *Kevorkian, supra* at 411. The questioning of witnesses is a matter of trial strategy and will not support a claim of ineffective assistance of counsel. *In re Rogers*, 160 Mich App 500, 505; 409 NW2d 486 (1987). Respondent has failed to establish that she was denied the effective assistance of counsel at the permanent wardship trial.[2]

IV

Respondent-father claims that reversal of the termination order is required because his appointed counsel also represented the children. He argues that it was improper for attorney Groenhout to act as lawyer-guardian ad litem (L-GAL) and then five months later to represent respondent-father. While the ethical violation was apparently inadvertent, it falls within the category of plain error seriously affecting the fairness or integrity of the proceeding. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). We agree that an ethical violation resulted from attorney Groenhout's representation of respondent-father after representing the children in the same case, but conclude that reversal is not required. *In re Osborne*, 459 Mich 360, 369; 589 NW2d 763 (1999).

This Court reviews questions of law de novo. *In re CR, supra* at 200. The role of the L-GAL in child protective proceedings is suggested by the definition of "attorney" in MCL 712A.13a(1)(b), which states:

> "Attorney" means, if appointed to represent a child in a proceeding under section 2(b) or (c) of this chapter, an attorney serving as the child's legal advocate in a traditional attorney-client relationship with the child, as governed by the Michigan rules of professional conduct. An attorney defined under this

[2] We note, however, that the trial court clearly erred in discharging respondent-mother's attorney and holding a review hearing on September 5, 2003, without appointing a new attorney for her. MCR 3.915(B)(1); *In re Powers Minors*, 244 Mich App 111, 122-123; 624 NW2d 472 (2000); *In re Hall*, 188 Mich App 217, 221-222; 469 NW2d 56 (1991). Nonetheless, reversal is unwarranted because we cannot conclude that the error was prejudicial, i.e., outcome determinative. *Id*. at 222-223. Respondents' interests in opposing the removal of the children were represented by counsel for respondent-father, who argued strenuously against the pick-up order during the September 5 hearing. It is unlikely that any additional argument would have changed the outcome of the hearing. It is also unlikely that the deprivation of counsel at this hearing would have changed the outcome of termination proceedings. The record of the October 14, 2003, emergency removal hearing indicates that counsel had contact with respondent-mother after the September 5 hearing and advised her to turn the children in, but she did not.

> subdivision owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client.

Attorney Groenhout's "serial representation" of the children and then respondent-father violated MRPC 1.9(a), which provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

The situation in this case, where the lawyer first represents the children or the FIA and later represents the indigent parent, is less likely prejudicial than that considered in *Osborne, supra*, where appointed counsel represented two parties with opposing interests in one case. As respondent-father concedes, attorney Groenhout's role as L-GAL was minimal, consisting of limited involvement in the September 5 hearing. We disagree with respondent-father's argument that automatic reversal is required under these circumstances. Rules of automatic reversal are disfavored, and absent "demonstrated harm" or "an actual deprivation of an important right," reversal is not required. *In re Osborne, supra* at 369, n 10.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Bill Schuette