STATE OF MICHIGAN

COURT OF APPEALS

In re HULL, Minors.

UNPUBLISHED
December 20, 2016

No. 333081
Kent Circuit Court
Family Division
LC No. 13-053506-NA;
13-053507-NA;
13-053508-NA;
13-053509-NA

In re MAYER/HULL, Minors.

No. 333082
Kent Circuit Court
Family Division
LC No. 13-053505-NA;
13-053506-NA;
13-053507-NA;
13-053508-NA;
13-053509-NA

Before: WILDER, P.J., and MURPHY and O'BRIEN, JJ.

WILDER, P.J. (*concurring*).

I concur in the result reached by the majority but write separately because, given the record before us and the unsupported allegations of ineffective assistance of counsel made by respondents, I would not express a concern or otherwise implicitly criticize trial counsel regarding the dual representations at issue in these matters.

It is axiomatic that the burden of establishing the factual predicate for a claim of ineffective assistance rests upon the party asserting that claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). As respondent-father admits in his brief on appeal, there is no record evidence whether "either father consented to [] dual representation" by fathers' counsel; thus, it is possible that the fathers did, in fact, consent. There is also no record evidence that the fathers' interests conflicted. Notwithstanding, the majority evidently assumes that counsel should have obtained conflict waivers from the fathers and failed to do so. That assumption, unsupported by record evidence as it is, contravenes the fundamental principle that counsel is presumed to have

performed effectively. See, e.g., *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012) ("Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise."). Based on the record before us, I would conclude that even implicit criticism of fathers' counsel on ethical grounds is unmerited.

Likewise, there is no record evidence, in my estimation, which warrants criticism of attorney Judith Raskiewicz for, after twice standing in for mother's appointed counsel at hearings, later filling in as the children's lawyer-guardian ad litem at the uncontested termination hearing. As the majority concedes, "there is nothing in the record to suggest that respondent-mother was prejudiced in any way by this representation," nor is there any record evidence whether mother consented to the representation. At the termination hearing, mother was not questioned by Raskiewicz, admitted that she was unable to provide the children with proper care and custody, and *voluntarily* released her parental rights.[1] There is, as such, no evidence that the interests of mother and the children were divergent at the time of the termination hearing. On the contrary, in concert with mother's decision to voluntarily release her parental rights, the trial court's finding that termination was in the best interests of the minor children strongly suggests that the interests of mother and the children were congruent. Accordingly, there is no evidence from which it can be fairly determined that an actual conflict of interest existed or that Raskiewicz disregarded such a conflict.

For those reasons, I concur in the result reached by the majority, but I cannot join in intimating that the dual representations below were troubling.

/s/ Kurtis T. Wilder

[1] Indeed, if there was any disadvantage resulting from Raskiewicz's representation of the children at the termination hearing, the disadvantage would rest with the minor children, not mother. The usual conflict of interest dilemma is that, while representing a new client, counsel may use confidential information learned in a prior representation to the detriment of counsel's former client. But the record belies any claim that Raskiewicz used the mother's confidences against her at the termination hearing. Moreover, there is no evidence that mother ever entrusted Raskiewicz with any confidences in the first instance.