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UNPUBLISHED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.

PER CURIAM.

In Docket No. 333081, respondent-father appeals as of right the circuit court's order terminating his parental rights to four minor children. In Docket No. 333082, respondent-mother appeals as of right the circuit court's order terminating her parental rights to five minor children.[1] On appeal, both parents argue that they were deprived of their constitutional right to the effective assistance of counsel. We affirm in both cases.

[1] Respondent-father and respondent-mother are the biological parents of the four children at issue in Docket No. 333081 and four of the five children at issue in Docket No. 333082. With respect to the other child at issue in Docket No. 333082, the parental rights of the fifth child's father were also terminated and are not at issue in this appeal.

Because respondents did not raise this argument below, it is unpreserved and reviewed for mistakes apparent on the record. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). [2] The constitutional right to due process guarantees the right to effective assistance of counsel in child-protective proceedings. *In re CR*, 250 Mich App at 197. Relatedly, MCR 3.915(B)(1) requires that counsel be appointed for indigent parents at all hearings in child protective proceedings. To establish ineffective assistance of counsel, respondents must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. See *People v Pickens*, 446 Mich 298, 308-314; 521 NW2d 797 (1994). Under this standard, reversal is appropriate only where actual prejudice has been shown. *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 603; 603 NW2d 824 (1999) (stating that "we believe that the Supreme Court has concluded that a plain error regarding a conflict of interest of counsel falls within the category of error for which prejudice must be proved before reversal may be ordered.").

"It is a well-established ethical principle that an attorney owes undivided allegiance to a client and usually may not represent parties on both sides of a dispute." *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 197; 650 NW2d 364 (2002) (citations and internal quotation marks omitted). Michigan Rule of Professional Conduct 1.7 provides as follows:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.
>
> Relatedly, Rule 1.9 provides, in pertinent part, as follows:

[2] While developed in a different context, courts may rely on the principles of effective assistance of counsel developed in criminal law in child protective proceedings as well. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002).

> (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.
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> * * *
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has come generally known; or
>
> (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or requirement with respect to a client.

In Docket No. 333081, respondent-father argues that his trial counsel's performance constituted ineffective assistance of counsel due to a conflict of interest. Throughout proceedings in this matter, respondent-father and the fifth child's father were both represented by the same attorney. On appeal, respondent argues that this dual representation constituted an impermissible conflict of interest. While we are troubled by this dual representation, we ultimately conclude that respondent-father has not adequately demonstrated that he was prejudiced by this representation.

Applying those principles to this case, we conclude that respondent-father has failed to adequately demonstrate that he was prejudiced by any conflict of interest that may have existed due to the dual representation. We admittedly share concerns with respondent-father regarding his trial counsel's ability to represent both fathers, albeit with respect to different children, in light of the overlapping allegations between the two. Thus, while each father's interests were not necessarily adverse, we struggle to ascertain why dual representation was appropriate here. Nevertheless, even assuming objectively unreasonable performance, we conclude that a different result was not reasonably probable but for the dual representation. Nothing in the record supports the idea that respondent-father could provide the children with proper care and custody at any time throughout the proceedings in this matter or in the reasonable future, and respondent-father admitted the same when he voluntarily released his parental rights. We therefore conclude that reversal is unnecessary.[3]

[3] Additionally, respondent-father does not indicate how he was prejudiced by the dual representation. Rather, he merely assumes that his "attorney's assistance was ineffective because he could not represent both [fathers'] interests." Again, while we are troubled by this dual representation, we are not willing to assume that respondent-father was prejudiced by any error in that regard. Stated differently, respondent-father has not satisfied his appellate burden of

Similarly, in Docket No. 333082, respondent-mother argues that her trial counsel's performance constituted ineffective assistance of counsel after she failed to object to a conflict of interest. Specifically, she argues that a conflict of interest occurred when an attorney, Judith Raskiewicz, who represented her as a substitute for her trial counsel during two hearings subsequently substituted as the minor children's guardian ad litem. While we are equally troubled by this dual representation, we ultimately conclude that respondent-mother has not adequately demonstrated that she was prejudiced by this representation.

Applying the principles set forth above, we agree with respondent-mother's claim that her trial counsel should have objected to Raskiewicz's representation of the children. While it is true that Raskiewicz only represented respondent-mother during two hearings and the minor children during the uncontested termination hearing, there is nothing in the record to suggest that respondent-mother consented to this dual representation, and respondent-mother's and the children's interests were sufficiently adverse to constitute a conflict of interest. Nevertheless, as with respondent-father, we conclude that respondent-mother has failed to adequately demonstrate that she was prejudiced by any conflict of interest that may have existed. Nothing in the record supports the idea that respondent-mother could provide the children with proper care and custody at any time throughout the proceedings in this matter or in the reasonable future, and respondent-mother admitted the same when she voluntarily released her parental rights. We therefore conclude that reversal is unnecessary.[4]

Affirmed.

/s/ William B. Murphy
/s/ Colleen A. O'Brien

providing factual support for his claim of error, and we are unable to find any factual support for him. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

[4] Additionally, respondent-mother does not indicate how she was prejudiced by the conflict of interest. On appeal, she points to the fact that her decision to voluntarily terminate her parental rights may have been impacted by Raskiewicz's subsequent representation of the children, but this speculation, in our view, is insufficient to warrant reversal or a remand. Respondent-mother unequivocally agreed that it was her choice to voluntarily release her parental rights to the children at issue, and there is nothing in the record to undermine her agreement that her plea was "freely, understandingly, and voluntarily" given.