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STATE OF MICHIGAN

COURT OF APPEALS

In re Jacques/Swanson, Minors.

UNPUBLISHED
April 18, 2019

Nos. 344530; 345160
Charlevoix Circuit Court
Family Division
LC No. 17-006901-NA

Before: MURRAY, C.J., and SAWYER and REDFORD, JJ.

PER CURIAM.

In Docket No. 344530, respondent-mother appeals as of right an order terminating her parental rights to three minor children—ZDJ, BGJ, and ESS—under MCL 712A.19b(3)(b)(*ii*) (failure to prevent physical or sexual abuse of the child or sibling of the child, and reasonable likelihood of future injury or abuse to the child) and (j) (reasonable likelihood of harm to the child). In Docket No. 345160, respondent-father appeals as of right an order terminating his parental rights to ESS under MCL 712A.19b(3)(b)(*i*) (perpetration of physical or sexual abuse against the child or sibling of the child, and reasonable likelihood of future injury or abuse to the child) and (j).[1] We affirm.

The instant child-protection proceedings were initiated in the summer of 2017 after a referral involving allegations of sexual abuse by respondent-father against ZDJ. At this time the family had already been receiving services in connection with a referral involving physical abuse against ZDJ by respondent-father and in connection with a referral involving emotional abuse against respondent-mother by respondent-father. Petitioner, the Department of Health and Human Services (DHHS), initially sought temporary jurisdiction over the children in connection with the instant case, but after ZDJ disclosed many more instances of serious sexual abuse,

[1] Respondent-father was the stepfather of ZDJ and BGJ and is the biological father of ESS. DJ, who is not a party to these appeals, is the biological father of ZDJ and BGJ and was a third respondent in the lower court proceedings. As of the date of the termination of respondent-mother's and respondent-father's parental rights, the case involving DJ remained ongoing.

including multiple penetrations, by respondent-father, petitioner, in December 2017, sought permanent custody, which the trial court granted after a lengthy hearing.

I. STANDARDS OF REVIEW

To terminate parental rights, the trial court must initially find, by clear and convincing evidence, a statutory ground for termination, MCL 712A.19b(3), and this Court reviews for clear error the trial court's factual findings and its ultimate determination that a statutory ground has been established, *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A finding is clearly erroneous if, even if some evidence supports it, the reviewing court is nevertheless left with the firm and definite conviction that the lower court made a mistake. *Id*. This Court also reviews for clear error a lower court's decision that termination is in a child's best interests. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012).

Respondent-father raises the issue of ineffective assistance of counsel and contends that the trial court should have granted his motion for rehearing based on ineffective assistance of counsel. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the . . . constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).[2] The court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id*.

This Court reviews for an abuse of discretion a trial court's ruling concerning a motion for rehearing. See *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

II. DOCKET NO. 344530

Respondent-mother contends that the lower court clearly erred by finding clear and convincing evidence for termination of her parental rights to ZDJ, BGJ, and ESS under MCL 712A.19b(3)(b)(*ii*) and (j).[3] We disagree.

MCL 712A.19b(3) states, in relevant part:

> The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> * * *

[2] "The principles applicable to claims of ineffective assistance of counsel in the arena of criminal law also apply by analogy in child protective proceedings[.]" *In re Martin*, 316 Mich App 73, 85; 896 NW2d 452 (2016).

[3] Respondent-mother does not make an appellate argument about best interests.

> (b) The child or a sibling of the child has suffered physical injury or sexual abuse under 1 or more of the following circumstances:
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> (*ii*) The parent who had the opportunity to prevent the physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.
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> * * *
>
> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

Initially, we note that respondent-mother, citing *In re Jenks*, 281 Mich App 514, 517; 760 NW2d 297 (2008) (discussing sexual abuse of a child's half-sibling) has conceded that it is "beyond certainty" that DHHS presented sufficient evidence of sexual abuse of ZDJ by respondent-father to justify the termination of his parental rights to ESS. She contends, however, that DHHS did not establish the basis for termination listed in MCL 712A.19b(3)(b)(*ii*) as applied to her and the three children because the evidence of her having known of the abuse was tenuous. However, during a forensic interview, ZDJ stated that "his parents" made him have sex, and he elaborated upon this statement by saying that "his [m]om wanted him to have sex with [respondent-father]." ZDJ stated that he refused to do so, but respondent-mother "said that he had to or [respondent-father] would hurt him somehow." ZDJ thought the situation was "really weird," and he "hated that time." He stated that he did not disclose the abuse earlier because he did not feel comfortable talking about it with respondent-father and respondent-mother present.

Citing *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995), respondent-mother contends that ZDJ's assertion that respondent-mother knew of the abuse was contradicted by other evidence and did not amount to clear, direct, and weighty evidence such that it satisfied the standard for "clear and convincing" evidence. But *In re Martin*, the very case cited by respondent-mother, plainly states that evidence may be clear and convincing even if it has been contradicted. *Id*. The court, in making its findings regarding the statutory grounds for termination, made specific note of the clear-and-convincing standard of evidence. The court noted that it found ZDJ to be credible,[4] and it specifically found credible ZDJ's statement that respondent-mother told him that he had to have sex with respondent-father or negative consequences would result. This Court "defer[s] to the special ability of the trial court to judge the credibility of witnesses." *In re White*, 303 Mich App 701, 711; 846 NW2d 61 (2014).[5] The lower court also noted that the timing of ZDJ's statements did not cause the court to hesitate

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[4] We note that respondent-mother herself testified that ZDJ and BGJ were honest "[m]ost of the time."

[5] Videotapes of the children's interviews were admitted into evidence under MCL 712A.17b(5); accordingly, the trial court was able to assess ZDJ's demeanor.

about its findings, and the forensic interviewer testified that sometimes a child will disclose something in an interview that he or she failed to disclose earlier, because "disclosure is a process." Under these circumstances, respondent-mother's argument that DHHS failed to present clear and convincing evidence that respondent-mother knew of the sexual abuse fails.[6]

Accordingly, with regard to ZDJ, the evidence established that the child suffered sexual abuse and that the parent who had the opportunity to prevent it did not do so. MCL 712A.19b(3)(b)(*ii*). With regard to BGJ and ESS, the evidence established that a sibling of the child (i.e., ZDJ) suffered sexual abuse and that the parent who had the opportunity to prevent it did not do so. MCL 712A.19b(3)(b)(*ii*). In addition, the court found that all three children would be subject to harm if placed in respondents' home, and this conclusion is supported by clear and convincing evidence. The statute refers to "a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home." MCL 712A.19b(3)(b)(*ii*). ZDJ disclosed that respondent-father sexually abused BGJ. In addition, respondent-father digitally penetrated ESS's vagina to the point where it hurt. Moreover, the evidence showed that respondent-mother had parenting deficiencies, needed direction and assistance to parent the children, and was afraid to move out of the home she shared with respondent-father. This evidence, viewed as a whole, made it likely that all three children would suffer abuse in the foreseeable future if placed in respondent-mother's home, because they had already been subject to abuse by respondent-father, and respondent-mother was dependent upon respondent-father.[7]

Respondent-mother claims that her relationship with respondent-father should not be held against her because DHHS never gave her an ultimatum to leave him. This argument is not persuasive. First, that leaving respondent-father was the correct course of action, in light of what happened, should have been obvious to respondent-mother regardless of any "ultimatum" from DHHS. Second, respondent-mother testified at certain points during the proceedings that she did not believe the allegations of sexual abuse; accordingly, her claim on appeal that she would have

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[6] In addition, we note that MCL 712A.19b(3)(b)(*ii*) refers to "the opportunity to prevent the . . . abuse . . . ." The court, at one point in its findings, stated that respondent-mother was "at best dangerously oblivious to what was going on in her home." The court later fully accepted ZDJ's statement that respondent-mother knew of the abuse and was complicit in it, but even if respondent-mother did not explicitly know about the abuse, the court implicitly found that if respondent-mother had not been so "dangerously oblivious," she could have prevented the abuse.

[7] We note that respondent-mother, in her appellate brief, appears to be arguing that the trial court's findings were insufficient and also appears to be arguing that under MCL 712A.19b(3)(b)(*ii*), the trial court needed to establish respondent-mother's knowledge of sexual abuse against each child. However, under the plain language of the statute, the court only needed to find that respondent-father abused ZDJ, that respondent-mother had an opportunity to prevent this abuse but did not do so, and that each child was likely to suffer injury or abuse in the foreseeable future if placed in respondent-mother's home. MCL 712A.19b(3)(b)(*ii*). The court specifically made all three of these findings, and the findings are amply supported by the evidence.

left respondent-father if told to do so rings false. We note, too, that respondent-father testified that the relationship between respondent-mother and him was "better and stronger" than ever, and again, evidence showed that respondent-mother had fears about moving out of the home she shared with respondent-father. In addition, witnesses testified about respondent-mother's need for assistance in parenting, and there is insufficient evidence in the record regarding how respondent-mother would obtain sufficient assistance to meet the children's needs while living apart from respondent-father.

Under all the circumstances, the elements of MCL 712A.19b(3)(b)(*ii*) were established by clear and convincing evidence. The evidence supporting the elements of MCL 712A.19b(3)(b)(*ii*) also supports the elements of MCL 712A.19b(3)(j).[8] In addition, the elements of MCL 712A.19b(3)(j) are supported by the general evidence of respondent-mother's poor parenting abilities. In other words, even aside from the risk posed by respondent-mother's failure to protect the children from respondent-father, the evidence established that respondent-mother herself posed a risk of harm to the children because of her deficient parenting skills. Respondent-mother claims that she had made progress on becoming a better housekeeper and parent, but it was not unreasonable for the court to implicitly conclude that any future progress would be minimal, in light of substantial evidence that respondent-mother relied on others to help her parent.

III. DOCKET NO. 345160

A. STATUTORY GROUNDS

Respondent-father contends that the trial court clearly erred by finding bases for termination of his parental rights to ESS under MCL 712A.19b(3)(b)(*i*) and (j). We disagree. MCL 712A.19b(3) states, in relevant part:

> The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> * * *
>
> (b) The child or a sibling of the child has suffered physical injury or sexual abuse under 1 or more of the following circumstances:

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[8] Moreover, only one statutory ground is needed for termination of parental rights. *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). We note, too, that subparagraph (j) encompasses both physical *and* emotional harm. See *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). Evidence that respondent-mother did not believe the allegations of sexual abuse raised concerns about how the children would fare emotionally if returned to her.

(*i*) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

There was ample evidence that respondent-father sexually abused ZDJ. ZDJ disclosed as much during a forensic interview, and the court noted that it found ZDJ to be credible. As noted, this Court "defer[s] to the special ability of the trial court to judge the credibility of witnesses." *In re White*, 303 Mich App at 711. Respondent-father complains that ZDJ's allegations "came out only after [ZDJ and BGJ] had been placed into counseling," implying some type of fabrication, but the forensic interviewer testified that sometimes a child will disclose something in an interview that he or she failed to disclose earlier, because "disclosure is a process," and the trial court specifically found that the timing of ZDJ's statements did not cause the court to hesitate about its findings. In addition, respondent-mother found lubricant in the downstairs bathroom of the home, and the trial court found that this corroborated ZDJ's statements. The court, properly exercising its role to judge credibility, found respondent-mother's attempts to "explain away" the existence of the lubricant to be "self-serving and not credible."

Respondent-father emphasizes that he was not charged with sexually abusing ZDJ or BGJ, but the alleged fact that a prosecuting attorney decided that he or she could not prove criminal sexual conduct beyond a reasonable doubt is not dispositive regarding whether DHHS presented clear and convincing evidence of sexual assault—the standards are different. See, generally, *In re England*, 314 Mich App 245, 257-258; 887 NW2d 10 (2016).

Accordingly, the evidence established that ZDJ, a sibling of ESS, suffered sexual abuse and that respondent-father caused this sexual abuse. Therefore, the first two elements of MCL 712A.19b(3)(b)(*i*) were clearly satisfied. *In re Jenks*, 281 Mich App at 517. In *In re Jenks*, the Court stated, "Further, considering the nature of respondent's criminal sexual conduct with the other child, which included penetration, the trial court did not clearly err in determining that there is a reasonable likelihood that the minor children would suffer injury or abuse in the foreseeable future if placed in respondent's home." *Id*. at 517-518. In light of *In re Jenks* alone, we conclude that the trial court did not clearly err by determining that ESS would likely suffer injury or abuse in the foreseeable future if placed in respondent-father's home. Indeed, how respondent-father treated one child is probative of how he would treat another. See *In re Jackson*, 199 Mich App 22, 26; 501 NW2d 182 (1993). However, there is an even stronger basis, under the circumstances of the present case, to support the likelihood of future harm to ESS. Indeed, respondent-father digitally penetrated ESS's vagina, allegedly while cleaning bowel movements, to the point where ESS found it "painful;" ESS would "cry and scream" as a result. Respondent-father reported to a DHHS worker that "he was the only one that could" clean ESS's bowel movements correctly. This evidence supported a finding that ESS was at risk of future injury or abuse at the hands of respondent-father. MCL 712A.19b(3)(b)(*i*).

In addition, MCL 712A.19b(3)(j) encompasses emotional as well as physical harm, see *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011), and that respondent-father committed extreme sexual abuse against a sibling was certainly not a positive factor for ESS's emotional well-being. Further, as noted, the evidence established that respondent-father caused pain to ESS by digitally penetrating her vagina, allegedly to remove large bowel movements, and he believed he was the only one able to clean her properly. Respondent-father also gave strange excuses—such as claiming that he was taking "Norco" regularly for "extreme[] pain[]," yet at the same time doing a lot of driving, and claiming that something in the water made the toilets black—about why he had let his home deteriorate into a deplorable condition. Under all the circumstances, there was a reasonable likelihood that ESS would be harmed if returned to respondent-father's home. MCL 712A.19b(3)(j). The trial court properly found that petitioner established statutory grounds for termination of respondent-father's parental rights.

B. BEST INTERESTS

"If a trial court finds that a statutory basis for terminating parental rights exists by clear and convincing evidence, it is required to terminate parental rights if it finds from a preponderance of evidence on the whole record that termination is in the children's best interests." *In re Brown/Kindle/Muhammad Minors*, 305 Mich App 623, 637; 853 NW2d 459 (2014) (quotation marks and citation omitted); see also MCL 712A.19b(5).

> To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [*In re White*, 303 Mich App at 713-714 (quotation marks and citations omitted).]

It is not disputed that ESS had a bond with respondent-father. In addition, the trial court correctly noted that ESS's special needs could potentially make her a difficult candidate for adoption. However, the court did not clearly err by finding that a preponderance of the evidence nevertheless established that it would be in ESS's best interests to terminate respondent-father's parental rights. Evidence established that respondent-father committed extremely serious acts of sexual penetration against ZDJ, a sibling of ESS.[9] Even if one disregards any abuse against ESS herself, how respondent-father treated one child was probative of how he would treat another. See *In re Jackson*, 199 Mich App at 26. In addition, even if one accepts respondent-father's assertion that his admitted penetration of ESS's vagina during diaper changes was not *sexual*

[9] The evidence also supported a finding that respondent-father sexually penetrated BGJ, but the court largely focused on the abuse of ZDJ, which was more extensive.

abuse, it constituted physical abuse; indeed, it caused her such pain that she would "cry and scream" as a result.[10]

Moreover, respondent-father, despite having multiple college degrees, was not employed, and he admitted that he had no "income in the foreseeable future that is lined up." Despite his high intelligence, he had let his home deteriorate into a deplorable condition. A therapist testified that she had "major concerns" about respondent-father being a parent, and another therapist testified that she was concerned about ESS's safety if placed in respondent-father's care.

Given all these circumstances, the trial court did not clearly err by finding that it was in the best interests of ESS to terminate respondent-father's parental rights.

C. ASSISTANCE OF COUNSEL

Respondent-father's motion for rehearing was entirely based on his claim of ineffective assistance of counsel. To obtain relief based on ineffective assistance of counsel, a party "must show that counsel's performance fell short of [an] . . . objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the outcome of the . . . trial would have been different." *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015) (quotation marks, citation, and brackets omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quotation marks and citation omitted).

As an initial matter, we note that respondent-father's argument on appeal for this issue consists mainly of a laundry-list recitation of what he said below at the evidentiary hearing; in other words, he recites the facts from the evidentiary-hearing transcript, but makes little effort to explain, with specificity, how the trial court *erred in its ruling* regarding the claim of ineffective assistance. We will, at any rate, briefly address the various laundry-list recitations made by respondent-father.

Respondent-father refers to his desire at the time of the termination hearing that "character-type" witnesses be called. However, respondent-father does not provide an offer of proof regarding how these "character-type" witnesses would have testified. As noted in *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), an appellant claiming ineffective assistance of counsel "bears the burden of establishing the factual predicate for his claim." In addition, the trial court specifically ruled that witness testimony about character would not have affected its decision to terminate respondent-father's parental rights. Accordingly, respondent-father has not demonstrated any outcome-determinative error, *Ackley*, 497 Mich at 389, with regard to character witnesses.

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[10] The court noted that this action constituted sexual *or* physical abuse because the insertion hurt ESS and caused her to cry and scream.

Respondent-father refers to his desire that "a counselor" and a "physician's assistant" be called as witnesses, but respondent-father gives no indication in his appellate brief about what these witnesses would offer as testimony. This Court will not unravel an appellant's arguments for him, *People v Waclawski*, 286 Mich App 634, 679; 780 NW2d 321 (2009), and respondent-father has not established the factual predicate regarding how the testimony of these witnesses was pertinent to his defense, *Carbin*, 463 Mich 600.

Respondent-father refers to his belief that the defense could have proven that the children had access to pornography only at their grandparents' residence. Once again, respondent-father does not, in his appellate brief, expound upon this assertion, and therefore his briefing is inadequate. *Waclawski*, 286 Mich App at 679. At the hearing below, respondent-father asserted that this assertion about pornography access could have been proven "with Grandma," "with the boys," and with "records from the phone company." Respondent-father makes no offer of proof indicating that testimony from "Grandma" or from the boys, or records from the telephone company, would have established this alleged fact about pornography access, and therefore he has failed to establish the factual predicate for his argument. *Carbin*, 463 Mich at 600. In addition, ZDJ stated that respondent-father taught him how to view pornography and watched pornography with him.

Respondent-father refers to his desire to call an expert regarding implanted memories, but once again he has failed to indicate what testimony such an expert would offer and therefore has failed to establish the factual predicate for his claim. *Id*. Nor does he provide an offer of proof regarding how an expert on forensic interviews would have testified. *Id*. Respondent-father, referring to his master's degree in social science, appears to be suggesting that he himself should have been called to rebut the validity of ZDJ's crucial forensic interview, but merely having a master's degree in social science does not make one an expert in the forensic interview protocol. As noted by the trial court, respondent-father's claims of deficiencies in the interview were based on his "own[,] self-serving, lay opinion of forensic interview protocol," and respondent-father did not adequately challenge the qualifications of the person who actually conducted the interview.

Respondent-father refers to his desire that counsel explore further the issue of ZDJ's having possibly been sexually abused by DJ, his biological father. This issue *was* explored at trial, and a DHHS employee testified that the allegation against DJ had not been substantiated. Under these circumstances, it was not below an objective standard of reasonableness for respondent-father's attorney, John Jarema, to decide not to push the issue. Respondent-father appears to be suggesting that Jarema should have emphasized that ZDJ, at one point, claimed abuse at age five or six, before living full-time with respondent-father, but respondent-father himself admitted that he had been in contact with ZDJ at those ages. Accordingly, even assuming that Jarema should have asked more questions about this issue, there is no reasonable probability that the failure to do so affected the outcome of the proceedings. *Ackley*, 497 Mich at 389.

Respondent-father refers to the lack of medical evidence regarding his alleged erectile dysfunction. Respondent-father once again fails to submit an offer of proof that such medical evidence existed. In addition, Jarema testified that he did not introduce medical evidence of this alleged erectile dysfunction because it "was not medically diagnosed" but was based on

respondent-father's own statements, and at the evidentiary hearing it was elicited that a medical provider told a DHHS worker in July 2017 that "[respondent-father] has never shared with her any issues of impotence." Further, respondent-father himself testified about his alleged impotence. Under these circumstances, Jarema did not act below an objective standard of reasonableness by failing to pursue the possibility of medical testimony about impotence. In addition, as noted by the trial court, respondent-mother testified on February 23, 2018, that she had sex with respondent-father "probably four years ago." Therefore, ZDJ would have been approximately nine years old the last time respondent-mother and respondent-father had sex. Accordingly, respondent-father apparently was able to have sexual intercourse during the period when, according to ZDJ, the abuse commenced. The court properly concluded that the impotency issue was, therefore, not particularly relevant.

Respondent-father contends that Jarema failed to ask the witnesses pertinent questions. But respondent-father utterly fails to explain *what* questions Jarema should have asked. Again, this Court does not unravel an appellant's arguments for him. *Waclawski*, 286 Mich App at 679. In addition, whether to call or question witnesses is generally a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Respondent-father also claims that Jarema "failed to object to hearsay and other evidence which should not have been admitted before the [c]ourt," but again respondent-father fails to provide any specifics regarding the substance of this allegedly inadmissible evidence.[11] As such, respondent-father has not properly briefed the issue, *Waclawski*, 286 Mich App at 679, and has not shown deficient performance or outcome-determinative error, *Ackley*, 497 Mich at 389.

Contrary to respondent-father's assertions on appeal, Jarema vigorously defended respondent-father and comprehensively cross-examined witnesses, and he provided forceful closing arguments. And respondent-father's various statements or arguments in his appellate brief regarding ineffective assistance do not warrant any appellate relief. The trial court did not err by rejecting the claim of ineffective assistance of counsel and denying respondent-father's motion for rehearing.

We affirm in both appeals.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ James Robert Redford

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[11] Significantly, the trial court noted that *all* the parties had been mistaken *at first* about the admissibility of hearsay at the termination hearing, but the court stated that it would remedy any errors due to this mistake by limiting its findings accordingly.