

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE WELFARE OF:

M.L.M.

No. 39020-5-II
No. 39640-8-II
(consolidated)

UNPUBLISHED OPINION

Houghton, P.J. — J.M., the mother of M.L., did not appear for the trial on the Department of Social and Health Services' (DSHS) petition to terminate her parental rights. Her counsel did not move for a continuance, cross-examine DSHS's witness, call any witnesses, or present any argument. J.M. appeals, arguing that she received ineffective assistance of counsel and that her counsel breached the duty of loyalty to her. Concluding that, even if she received ineffective assistance of counsel, she suffered no prejudice, we affirm.¹

FACTS

In March 2007, due to concerns regarding J.M.'s drug use and her resulting neglect of M.L., DSHS petitioned the court to remove M.L. from J.M.'s home. The trial court found M.L. dependent on July 31. The court ordered J.M. to engage in services including casework services,

¹ A commissioner of this court initially considered J.M.'s' appeal on accelerated review under RAP 18.13A and then transferred it to a panel of judges.

visitation with M.L., mental health treatment, medication referrals, random urinalyses (UAs), drug and alcohol inpatient and outpatient treatment, parenting classes, and domestic violence support.

According to DSHS social worker Joan Bartlett, J.M. continually attended visitation but never requested increased or unsupervised visitation. J.M. also underwent UAs but confessed to Bartlett that she had used methamphetamine, her drug of choice, throughout the dependency and devised a way to cheat on her UAs. J.M. participated in two parenting classes, one in November 2007 and one in July 2008, but she did not continue with the program or appear to make any progress. She also regularly participated in mental health programs without progress. She did not attend counseling after January 2008. She dropped out of all services until May. From May to June, she participated in inpatient treatment.

On June 18, DSHS petitioned to terminate J.M.'s parental rights as to M.L. The trial court held a termination hearing on January 28, 2009.² J.M. did not appear at trial and her counsel stated, "With regards to my client, I would like to unfortunately go forward today. We have done every effort, myself and the social worker, to get my client here." Report of Proceedings (Jan. 28, 2009) (RP) at 5. DSHS agreed to proceed with the termination trial.

Bartlett testified that she was unable to work effectively with J.M. After DSHS petitioned for termination, J.M. attended six appointments with Bartlett but, in September 2008, ceased communicating with her. J.M. refused to answer her phone or mail. Bartlett last heard that, at

² The trial court continued the termination trial as to M.L.'s father because the arrangements to have him participate by telephone had fallen through. The court later terminated the father's parental rights as to M.L. Although he appealed, he later abandoned his appeal and we dismissed it.

the end of October, J.M. participated in mental health services and, by January 2009, began participating in a relapse prevention group and pathological gambling group. But Bartlett did not observe J.M. preparing for a home with M.L. Although J.M. knew the date of the termination trial, she failed to respond to DSHS's letters for several days and did not respond to Bartlett's phone calls. Bartlett believed that J.M. received phone messages, however, because J.M. underwent additional UAs that Bartlett had requested through phone messages.

Bartlett characterized J.M.'s parenting deficiencies as failure to attempt to create a home for M.L. or herself and failure to involve M.L. in any of her plans. According to Bartlett, there was no likelihood that M.L. could return to J.M. in the near future because J.M. failed to put any energy into planning a safe and stable environment for M.L. Bartlett also testified that continuation of J.M.'s parental rights would prevent M.L. from integrating into a permanent and stable adoptive home. According to Bartlett, termination of J.M.'s parental rights was in M.L.'s best interests.

After Bartlett's testimony, the guardian ad litem (GAL) told that court that he, too, had not heard from J.M. since July 2008 and that J.M. had made little progress remedying the risks attendant to her drug and alcohol abuse and mental health issues. The GAL stated that no parent was available or capable of taking care of M.L. and termination was in M.L.'s best interests.

Counsel for J.M. did not cross-examine Bartlett or the GAL or call any witnesses on J.M.'s behalf. Counsel notified the trial court that his last communication with J.M. was in July 2008. He also stated that an Office of Public Defense social worker had called J.M., e-mailed her, and left his card at her home in an attempt to ensure that J.M. knew to come to court for the

termination trial, all to no avail. J.M.'s counsel did not object to an exhibit offered by DSHS that contained certified copies of six court orders: the findings and dependency order and the dependency dispositional hearing order as to J.M., the dependency dispositional hearing order, three dependency review hearing orders, and the December 2005 judgment and sentence for forgery as to J.M. Finally, counsel for J.M. did not present any closing argument. The trial court issued an order terminating J.M.'s parental rights as to M.L. and she appeals.

Analysis

J.M. contends that she received ineffective assistance of counsel, in that her counsel's failure to move to withdraw, move for a continuance, or present a defense on her behalf essentially left her without representation at the termination trial. J.M. also argues that her counsel essentially testified against her, reinforcing the State's theory of the case, creating a conflict of interest, and breaching of the duty of loyalty.

Parents have both a statutory and constitutional right to representation by counsel throughout dependency and termination proceedings. RCW 13.34.090(2); *In the Matter of the Welfare of Myricks*, 85 Wn.2d 252, 253, 533 P.2d 841 (1975) (dependency proceeding); *In the Matter of the Welfare of Luscier*, 84 Wn.2d 135, 138-39, 524 P.2d 906 (1974) (termination proceeding). The right to counsel representation means the right to effective representation. *In the Matter of the Welfare of J.M.*, 130 Wn. App. 912, 922, 125 P.3d 245 (2005).

Under the civil standard of review for claims of ineffective assistance of counsel, the record must indicate that an attorney provided a meaningful hearing in order to be effective.³ *In*

³ Division Three employs a civil standard of review for ineffective assistance of counsel claims on review of termination of parental rights cases.

the Matter of the Dependency of Moseley, 34 Wn. App. 179, 184, 660 P.2d 315 (1983). Under the criminal standard, the burden is on the party alleging ineffective assistance to show not only that counsel's representation was deficient, but also that the ineffective representation prejudiced the party.⁴ *In the Matter of the Dependency of S.M.H.*, 128 Wn. App. 45, 61, 115 P.3d 990 (2005) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2025, 80 L. Ed. 2d 674 (1984)). A party is prejudiced when there is a reasonable possibility that the outcome of the case would have been different if not for the deficient representation. *Dependency of S.M.H.*, 128 Wn. App. at 61.

Our court has not adopted either standard of review in termination cases. We need not do so here because even if J.M. received deficient representation, we reject her claim under either standard of review because she fails to demonstrate any reasonable probability the outcome of the case would have differed had she received effective representation.

Here, it is clear that J.M. failed to adequately engage in the court-ordered services or make even minimally sufficient progress to warrant the return of her child. She participated in two parenting classes and several mental health programs with no progress until she abandoned her effort in May 2008. She also continued to abuse drugs and confessed to Bartlett that she devised a way to cheat her UAs. Further, J.M. failed to work effectively with either the DSHS social worker or the GAL, both of whom recommended terminating her parental rights. Finally, she failed to avail herself of defense counsel's representation despite vigorous attempts by counsel

⁴ Division One employs a criminal standard of review for ineffective assistance of counsel claims on review of termination of parental rights cases.

and a public defense social worker to contact her, including phone calls, emails, and visiting J.M.'s home. J.M. cannot demonstrate she suffered any prejudice by her counsel's representation and, thus, her claim of ineffective assistance of counsel fails.

J.M. further contends that her counsel's statements to the trial court demonstrated a conflict of interest and a breach of counsel's duty of loyalty. We disagree.

At the trial court's questioning, defense counsel candidly informed the court that he had not been in contact with J.M. since July 2008, despite his repeated attempts to do so. This statement did not amount to a breach of duty, but rather an explanation of J.M.'s absence. J.M.'s claim of breach of duty fails.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Houghton, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.