

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of THERON RAY ROBINSON,
Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

DEBRA MCLEOD,

Respondent-Appellant.

UNPUBLISHED
February 10, 2005

No. 257614
Tuscola Circuit Court
Family Division
LC No. 02-008361-NA

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating her parental rights to the minor child under MCL 712A.19b(3)(b)(i), (b)(ii), (c)(i), and (c)(ii). We affirm.

The trial court did not clearly err in determining that at least one of the statutory grounds for termination of parental rights was established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The evidence showed that respondent had failed in the past to protect three older children from abuse, and the doctrine of anticipatory neglect indicated that she would be unable to protect Theron. *In re Powers*, 208 Mich App 582, 588-593; 528 NW2d 799 (1995); *In re LaFlure*, 48 Mich App 377, 391-392; 210 NW2d 482 (1973). This formed the condition of adjudication leading to Theron's wardship. An additional condition was respondent's emotional health, which prevented her from appropriately parenting.

Respondent's personality caused her to place her own relationships before the needs of her children, and although she attended counseling, she did not make progress in modifying this aspect of her personality. Therefore, the evidence showed that Theron was likely to suffer abuse by others if returned to respondent. Respondent had not rectified that condition of adjudication and still suffered from emotional challenges that made her unable to appropriately parent Theron.

Subsections 19b(3)(b)(ii), (c)(i) and (c)(ii) were proper grounds for termination of her parental rights.¹

Respondent also argues that she was denied her constitutional right to the effective assistance of counsel. Effective assistance of counsel in a child protective proceeding is an indirect constitutional due process right, *Reist v Bay Circuit Judge*, 396 Mich 326, 349; 241 NW2d 55 (1976), and this Court reviews constitutional issues de novo. *Kampf v Kampf*, 237 Mich App 377, 381; 603 NW2d 295 (1999).

The right to counsel means the right to effective counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). This right to effective assistance of counsel is explicitly guaranteed in criminal cases, and the principles surrounding it developed in the context of criminal law apply by analogy in child protective proceedings. *In re CR*, 250 Mich App 185; 646 NW2d 506 (2001).

To establish a claim of ineffective assistance of counsel, respondent is required to show that her attorney's performance was prejudicially deficient and that, under an objective standard of reasonableness, the attorney made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused (respondent) to receive a fair trial. *United States v Cronin*, 466 US 648, 658; 104 S Ct 2039, 2046; 80 L Ed 2d 657 (1984). In showing that counsel's representation was deficient, a defendant (respondent) must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984). It is a general rule that this Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy. *People v Cicotte*, 133 Mich App 630, 636-637; 349 NW2d 167 (1984). To demonstrate prejudice, a defendant (respondent) must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland, supra* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

Respondent alleges four instances of ineffective assistance: (1) failure to present witnesses on her behalf, (2) failure to cross-examine witnesses on her behalf, (3) disrespect toward her throughout direct examination, and (4) a closing argument which only served to strengthen the case against her.

On appeal, respondent identifies for the first time Dr. Binkley and Dr. Donovan as witnesses who could have affirmed her ability to parent. However, she does not establish that fact by providing copies of the evidence they may have proffered, namely her independent psychological evaluation and a psychiatric report, on appeal. The evidence presented by Dr. Binkley and Dr. Donovan may well have had negative effects as well as positive ones. In

¹ However, the evidence was not clear and convincing that respondent herself inflicted physical injury or abuse on her children in the past, and thus subsection 19b(3)(b)(i) was not an established ground for termination.

addition, one of the primary issues in the trial court was not merely respondent's ability to parent the minor child alone, but her failure to protect him from outsiders. Thus, respondent has not sustained her burden of overcoming the presumption that counsel's failure to call Drs. Binkley and Donovan was sound trial strategy.

A review of the record reveals that counsel for respondent did cross-examine key witnesses, such as the caseworker and psychologist, and attempted to bring out the positive aspects of respondent's compliance with the therapy and visitation requirements of her parent agency agreement. Respondent does not reveal on appeal just how counsel could have elicited positive testimony by cross-examining other witnesses, such as the therapist or the maternal grandmother, and respondent has not sustained her burden of overcoming the presumption that counsel's decision to forego cross-examining them was a matter of trial strategy.

Respondent's counsel had little regard or patience for respondent and the content of several of his questions belittled her during direct examination. Counsel's closing argument was a poor example of vigorously advocating on behalf of a client and failed to promote her cause. Such matters were not within the scope of sound trial strategy, and counsel demonstrated poor advocacy in engaging in such a manner.

However, the question in an ineffective assistance of counsel claim is whether counsel's representation was so prejudicially deficient and whether he, under an objective standard of reasonableness, made errors so serious that he effectively denied respondent a fair trial. A review of the record shows that his representation was not so deficient that it denied respondent a fair trial. There is no reasonable probability that the result of the proceeding would have been different even if he had treated respondent with the utmost respect, and even if he had given a closing argument that highlighted respondent's few positive achievements. Counsel did not engage in error sufficient to undermine confidence in the outcome of the trial court proceeding. Therefore, respondent was not denied the effective assistance of counsel.

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White