STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
December 13, 2012

In the Matter of VANOSTRAN, Minors.

No. 309503
Kalamazoo Circuit Court
Family Division
LC No. 2004-000378-NA

In the Matter of VANOSTRAN, Minors.

No. 309562
Kalamazoo Circuit Court
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LC No. 2004-000378-NA

Before: SERVITTO, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

In this consolidated appeal, respondents appeal as of right the trial court order terminating respondent mother's parental rights under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g) and (j), and respondent father's parental rights under MCL 712A.19b(3)(g) and (j). We affirm the order terminating respondents' parental rights to JV, DV, RV and DJV, but conditionally reverse the order terminating respondents' parental rights to SKV, and remand to the trial court for resolution of the notice issue under the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*

Respondents' relationship began in approximately 2001 when respondent father was 16 years old and respondent mother was in her 20s. They married in 2003. Respondent father was raised in an abusive home and was placed in foster care twice, completed 11th grade special education classes, had difficulty with anger issues in school, and was diagnosed with bipolar disorder and Attention Deficit Hyperactivity Disorder. He did not consistently take medication prescribed for those issues. Respondents were the parents of five children, SKV, JV, DV, RV, and DJV. Respondent father was not SKV's biological father, but adopted him in 2006. All five children had special needs, and the evidence showed SKV, JV and DV were particularly difficult to manage because of their disruptive behaviors. Twins RV and DJV were developmentally delayed, but at their young ages were not diagnosed with behavioral issues.

This child protective proceeding spanned eight years. After receiving referrals in 2002 and 2003 alleging respondent father's perpetration of domestic violence and respondents' neglect of the children, and allegations in 2004 from SKV's school and from a visiting nurse that the

neglect continued, that the home was in complete squalor and SKV was not receiving his medication, petitioner filed Petition A on November 29, 2004 alleging SKV and JV's physical, medical and educational neglect and the environmentally unfit condition of the home. SKV and JV were removed from respondents' care. The trial court assumed jurisdiction over SKV and JV, respondents complied with services, and SKV and JV returned home in May 2005. DV was born to respondents in June 2005, and respondents received the services of a visiting nurse who noted in her closing report that respondents would likely always have difficulty keeping their home clean. SKV and JV's temporary wardship was dismissed in September 2005.

In January 2007, three-year-old JV alleged in a forensic interview at school that respondent father had cut him on the buttock with a knife, and SKV came to school with a scratched face and a bruised ear. Respondents stated JV's injury was inflicted by a fellow student but an examining physician found the wound and surrounding bruises suspicious. In addition, SKV's counselor had noted domestic violence between respondents and recommended that they separate, and respondent father's mother noted he was not treating his mental health issues. Petitioner prepared Petition B in January 2007, alleging JV's injury and respondent father's domestic violence and untreated mental health issues, and the trial court authorized it in February 2007, ordering SKV, JV and DV remain in respondent mother's care and prohibiting respondent father's presence in the home or contact with the family, respondents' continued compliance with SKV's counseling services, and provision of in-home Families First services. Respondents complied with Families First, respondent father met with a psychiatrist and began taking medication to stabilize his mental health, and the trial court dismissed Petition B on March 22, 2007.

Twins RV and DJV were born to respondents August 16, 2008. By January 2009, respondents had reportedly separated for at least the 20th time due to domestic violence, and Families First services were again implemented to address an unclean home and in response to numerous police reports of domestic violence resulting in property damage and injury to respondent mother and SKV. During the time Families First worked with them, respondents moved to a more spacious home that they kept clean, did not engage in domestic violence, and stated that they understood domestic violence traumatized the children. However, one month after Families First closed services, on March 2 and 3, 2009, respondent father physically abused respondent mother, who reported to her sister that she thought respondent father was going to kill her. Respondent mother did not leave the home with the children, and on March 4, 2009, SKV called 911 to report domestic violence between respondents. Respondent mother sustained multiple injuries in the March 4, 2009 incident, police officers reported the home looked as though a tornado had passed through and had broken furniture and fixtures, and respondent father punched SKV on the back of the neck when he attempted to protect respondent mother by striking respondent father with a broken door.

Petitioner filed Petition C on March 5, 2009, alleging deplorable home conditions, respondent father's domestic violence and respondent mother's failure to protect the children, and the trial court again ordered the children remain in respondent mother's care and respondent father leave the home and have no contact with the family. Respondents were seen together in violation of the no-contact order, respondent father assaulted respondent mother again in April 2009, knocking her out, and the trial court ordered respondent mother and the children to move to an undisclosed location. The adjudication trial on Petition C was held May 14, 2009, at which

the trial court assumed jurisdiction over the children, allowing them to remain in respondent mother's care on condition of no contact with respondent father. Respondent mother was unhappy about moving and the trial court, under the condition that she obtained a personal protection order, allowed her to return to her home after respondent father became incarcerated for domestic violence. In June 2009, respondent father was released and assaulted SKV and the children's maternal grandparents, after which respondent mother and the twins drove off in the van with him. Officers responding to the June 2009 incident reported respondent mother's home was again in deplorable condition.

The children were removed on June 3, 2009. Respondent mother immediately complied with services, completing all services requested of her, and respondent father, after delaying contact with the caseworker for several months, completed parenting classes and a domestic violence program in March 2011. In May 2011, JV and DV returned to respondent mother's care with in-home Family Reunification Program (FRP) services, and SKV had weekend visits. Respondents did not reside together during the proceeding, but when it became apparent that they were intent on planning for reunification together, the trial court ordered in June 2011 that they begin marriage counseling. Respondent mother was unable to sustain an environmentally fit home or effectively manage JV and DV's educational needs and difficult behaviors, and they were re-removed from her care on August 30, 2011. Petitioner filed the termination petition September 13, 2011, and the trial court terminated respondents' parental rights on March 22, 2012.

In docket no. 309503, respondent father raises two issues different from those raised by respondent mother on appeal: the trial court's failure to address SKV's possible Indian heritage, and denial of his constitutional right to a full and fair hearing. In docket no. 309562, respondent mother raises several issues different from those raised by respondent father on appeal: the trial court's error in finding the evidence sufficient to terminate her parental rights, including making an improper comparison between her home and a foster home; error in finding petitioner made reasonable reunification efforts; denial of her right to procedural due process; and that she was deprived effective assistance of counsel. In addition, both respondents assert the trial court erred in finding termination of parental rights to be in the children's best interests.

The evidence showed that SKV's possible Indian heritage was raised at the outset of the 2004 proceeding. The trial court referee stated in its written memorandum following the November 29, 2004 preliminary hearing,

> In the course of its hearing, the Court directed and the order recognizes that the caseworker complete a due diligence affadavit [sic] on [GK], the father of [SKV] and initiate a MICWA[1] investigation on weakly strong references to possible Indian heritage.

[1] The Michigan Indian Child Welfare Agency (MICWA) is a non-profit organization under contract with the DHS to assist in cases involving American-Indian children.

It also stated in the written order, "Caseworker shall complete due diligence on [GK] by 12-6-04. MICWA Investigation shall proceed." Respondent father, as SKV's adoptive father, did not mention SKV's possible Indian heritage during the 2009-2012 proceeding, but respondent mother described SKV's race during the termination hearing as "black, white, and a little bit of Indian, not much. I don't know how accurate the Indian side is but it was told," and when questioned further about his Indian heritage later in the termination hearing stated, "I really don't know how concrete it is."

The ICWA, 25 USC 1901 *et seq.*, mandates that notice of certain involuntary child custody proceedings be sent to the appropriate Indian tribe or to the Secretary of the Interior "where the court knows or has reason to know that an Indian child is involved . . ." 25 USC 1912(a). As discussed recently by the Michigan Supreme Court in *In re Morris*, 491 Mich 81, 101; 815 NW2d 62 (2012), the Indian child, a parent, an Indian custodian of the child, or the child's tribe may petition a court to invalidate foster care placements and terminations of parental rights if the state court violated any provision included in 25 USC 1911, 1912, or 1913, with no apparent time limitation, and "[t]he import of this powerful remedy is that such an action to invalidate the proceedings could be brought even after the children had established permanency with a new family." *Morris*, 491 Mich at 101. Respondent father was not SKV's father when the question of Indian heritage arose in 2004, but adopted him in October 2006, and is his legal father when now raising this issue on appeal in docket no. 309503.

Given the interests protected by ICWA, the potentially high costs of erroneously concluding that notice need not be sent, and the relatively low burden of erring in favor of requiring notice, the Supreme Court found "the standard for triggering the notice requirement of 25 USC 1912(a) must be a cautionary one," and held that sufficiently reliable information of virtually any criteria on which tribal membership might be based suffices to trigger the notice requirement. *Morris*, 491 Mich at 88-89. The transcript of the November 29, 2004, hearing was not provided on appeal for review of the evidence indicating Indian heritage, but the trial court deemed the evidence "weakly strong" and felt it warranted provision of ICWA notice. On appeal, the parties agree that the lower court record does not show notice was provided in 2004. Given the fact that the notice requirement was triggered in 2004, it is unnecessary to decide whether respondent mother's comments during the 2012 termination hearing were also sufficient to require notice. If her comments were not sufficient, or even if she denied SKV's Indian heritage, the trigger occurred in 2004, and a parent cannot waive the child's status. *Morris*, 491 Mich at 111.

The proper remedy for an ICWA-notice violation is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue. *Morris*, 491 Mich at 89. Therefore, the trial court order terminating respondents' parental rights to SKV is conditionally reversed and the case remanded to the trial court for resolution of the ICWA-notice issue.

In docket no. 309562, respondent mother asserts the trial court erred in finding the statutory grounds for termination of her parental rights were established by clear and convincing evidence. MCR 3.977(K); *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). The conditions of adjudication with regard to respondent mother in 2009 were that "despite numerous

physical altercations in the presence of the children, mother has continued to reside in the household with [respondent father] and subject the children to domestic violence," and that previously, in both 2004 and 2007, she had neglected her children's educational, medical and basic everyday needs, allowed her home to become environmentally unfit, and failed to protect the children from physical abuse. Additional conditions of adjudication that arose in 2009 were respondent mother's inability to effectively parent and keep her home clean, lack of financial resources to provide for the children, and unstable emotional health that made her resistant to advice and correction and unable to sustain benefit from services. All of these conditions constituted a failure to provide the children with proper care and custody. She was notified of the additional conditions of adjudication in 2009, received recommendations to rectify them at seven or more hearings before the goal changed to termination of her parental rights, and was given two and a half years to make the needed changes.

Respondent mother asserts on appeal that she complied to the fullest with services, there was nothing she could have done to satisfy the trial court, and the trial court appeared to willfully search for a reason to terminate her parental rights. We agree that the evidence showed she complied with all services requested of her, but it also clearly showed she did not benefit from services and remained unable to safely and effectively parent the children. Benefit from a parent agency treatment plan in order to provide a proper home is required, as well as compliance. *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005).

The evidence showed respondent mother welcomed in-home services and readily complied with a domestic violence program and counseling, parenting classes, and individual counseling for her emotional health, but only voiced and did not internalize the effects of domestic violence, and never significantly improved her ability to protect, parent and meet the children's basic needs, let alone their special needs. She did not become able to maintain an environmentally fit home, or recognize a need to separate the children from respondent father during times the trial court ordered no contact, and when he failed to treat his bipolar disorder. Essentially, nothing changed in eight years despite multiple in-home interventions by Families First, FRP, visiting nurses, Wraparound, continuous Family and Children's Services' counseling and medication services provided to respondents to assist them with the children, completion of parenting classes in 2004, two sets of parenting classes during the 2009-2012 proceeding, completion of domestic violence programs in 2004 and 2009, counseling in 2004 and nearly three years of consistent counseling with one therapist from 2009 to 2012. The evidence showed respondent mother made diligent effort and partially benefitted while participating in services, but failed to internalize a benefit and immediately regressed to her previous neglectful forms of parenting and home maintenance once services ceased. She did not honestly report to counselors the extent of domestic violence she and the children had experienced, and her very tardy acknowledgement that it had been necessary to remove the children from a home with respondent father appeared to amount to mere lip service because she again minimized respondent father's domestic violence in her testimony at the termination hearing. She remained unable to manage the children and minimized their severely negative behaviors and significant special needs, asserting that returning home would improve their behaviors, while discounting the fact that their behaviors markedly improved when they were removed from her care.

The evidence supported the trial court's finding that respondent mother failed to rectify conditions that had constituted failure to provide proper care for the children, and that there was

no reasonable expectation she would do so within a reasonable time. Therefore, the trial court did not clearly err in terminating respondent mother's parental rights under §§ 19b(3)(c)(*i*), (c)(*ii*) and (g). In addition, the evidence and assessments performed by the Children's Trauma Assessment Center (CTAC) showed the children had suffered physical and traumatic emotional harm in her care. The fact that her home environment, ability to parent and protect, and relationship with respondent father had not changed significantly during the 2009-2012 proceeding showed the children would likely suffer additional harm if returned to her home. Therefore, the trial court did not clearly err in terminating respondent mother's parental rights under MCL 712A.19b(3)(j).

As an allegedly improper comparison of her home with a foster home, respondent mother cites the trial court's following observation in its written opinion:

> The oldest child has greatly improved in his academic performance and athletic activities. His mother refused to acknowledge the success of the foster parent in this case and instead chose to be critical of her claiming that the foster mother was making the home so stressful for [SKV] that he performed out of fear rather than out of a feeling of stability. In the mother's opinion, he could just relax if returned to her care and be himself which would probably mean that he would go back to his former troublesome behavior in school and lack of academic performance.

While a trial court may not consider the advantages of a foster home in deciding statutory grounds for termination, such consideration is appropriate in determining best interests. *In re Foster*, 285 Mich App 630, 635; 776 NW2d 415 (2009). Taken in the context of the entire opinion, the trial court's statement was not an improper comparison of homes but a response to respondent mother's assertion that removal and placement in foster care had caused the children's negative behaviors. It was part and parcel of its finding that respondent mother's parenting had traumatized the children and that, despite compliance with services, she had not gained insight into how harmful her parenting had been or her need to change. Immediately before the above-quoted statement, the trial court had noted that the behavior of all three older children had improved after removal and that return to respondent mother had caused JV and DV's behaviors to regress. The trial court did not improperly compare respondent mother's home with the foster homes.

Both respondents assert the trial court erred in finding termination of their parental rights in the children's best interests. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The trial court did not err. As noted recently in *In re Olive/Metts*, __ Mich App ___; ___ NW2d ___ (Docket No. 306279, issued June 5, 2012), slip op at 3, in deciding whether termination is in a child's best interests, the court may consider 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 has a duty to decide the best interests of each child individually. *Id.*

The trial court issued its opinion in this case on March 22, 2012, before the Court issued its decision in *Olive/Metts* on June 5, 2012, and made best interests findings regarding all of the children together instead of individually, although it specifically found that SKV, JV and DV had

made progress in foster care. In determining the children's best interests, the trial court stated it relied on "all the testimony presented." Much of the evidence, particularly the fact that reunification with respondents could not occur within a reasonable time and the children had special needs that required consistent and superior parenting, was applicable to all five children's best interests but, in addition, the CTAC reports that had been admitted into evidence made detailed individual findings regarding each child, and recommended against reunification for all of them.

The evidence showed, and the trial court correctly found, that the children were bonded to respondents, particularly respondent mother. However, the evidence also showed respondents were unable to parent the children alone or together and would not become able to do so within a reasonable time. Respondent father was not interested in parenting the children and had stated that returning them to his care would "set him up for failure," and by the time of the termination hearing he was no longer taking medication essential to stabilize his mental health. In addition, the evidence showed the children had extensive special needs. Their assessments at CTAC, and testimony by CTAC's director, showed that returning them to parents who experienced stress and a low frustration tolerance would be a "perfect storm" creating a high risk of harm, and that they would "absolutely" be at risk of further neglect and abuse if returned to respondents' care. The trial court correctly noted the children's special needs were being addressed in foster care, and they had made significant gains. Given the totality of the evidence, the trial court did not clearly err in finding termination of respondents' parental rights in the children's best interests.

Next, both respondents assert they were denied procedural due process, but for different reasons. Neither raised a due process issue in the trial court, and the issues are not preserved for appeal. Constitutional issues are reviewed *de novo*. *Kampf v Kampf*, 237 Mich App 377, 381; 603 NW2d 295 (1999). Unpreserved constitutional issues, however, are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). An error affects substantial rights if it causes prejudice, meaning that it affects the outcome of the proceedings. *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker. *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000). General due process, or fundamental fairness, in a child protective proceeding requires procedures designed to protect respondents' liberty interest in the care and management of their children while preserving the State's interest in protecting the children. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993).

Respondent father argues that statements made by the trial court indicated its desire to limit testimony, discouraged him from testifying, and improperly shifted the burden of proof to respondents. He asserts he was not provided an opportunity to be heard in a full, meaningful manner. The first statement respondent father relies on was made by the trial court at the outset of the termination hearing in which the trial court suggested limiting testimony to "updated" evidence that had not been presented or admitted in the form of exhibits in previous hearings:

> But I'm looking at three exhibit files, and I'm wondering if most of this case couldn't be found in the exhibit file, since what I heard in the opening statement is

> that both parents entered a plea. So, everything really could be reviewed by the Court, and the only testimony we really might need would be updated testimony since – if even that. I mean . . . if the caseworker has summarized the progress of the parents up to to [sic] date, we may not need a whole lot of testimony. I'm just throwing that out there. * * *I mean, we traditionally think we've got to have a whole bunch of testimony, and everybody rehashes what's in the reports, but we really don't need to do that.

The trial court's suggestion was appropriate given that the entire proceeding encompassed evidence presented in the 2004-2005 and 2007 interventions, and the 2009 proceeding had spanned more than 2-1/2 years and 128 exhibits had already been admitted into evidence. The trial court conducted the termination hearing over five days and admitted an additional 20 exhibits. Respondent father chose not to testify, but called two witnesses on his behalf. The trial court invited, but did not require, counsel for all parties to make lists of any previously-admitted exhibits that they wished to call to the trial court's attention, and to submit memos citing case law that might be particularly relevant to their positions. The trial court specifically asked counsel for respondent father for the citation to a case he noted in his closing argument, and assured all parties that it would review all of the exhibits and the testimony before issuing its written opinion. The trial court's attempt to streamline the proceeding was not error.

Respondent father also argues the trial court discouraged him from testifying and shifted the burden of proof to respondents by stating:

> We've got a lot going on with these children. It's a huge challenge for anybody. I'm really interested to see what the parents have to say about why they think that they could possibly handle all four-five of these children based on the testimony that we've heard. Quite honestly – quite honestly, by clear and convincing evidence today I could find reason to terminate parental rights. I haven't heard from mom and dad, so that could change. That could change. I understand that. But you need to be realistic folks. You need to be very realistic about what these children – not only what they can do for you, but what's in the children's best interests.

The statement was made after the trial court heard extensive testimony by the director of CTAC regarding the effect respondents' neglect and abuse had had on the children, and their significant special needs, and during discussion of whether respondents' visits with RV and DJV should be suspended since a termination proceeding was underway and RV experienced hardship caused by traveling to visits. Thus, when the trial court said "today I could find reason to terminate parental rights" it made the statement in the context of weighing the benefit of visits to respondents against the hardship caused RV in light of the fact that the evidence thus far in the proceeding weighed toward termination of parental rights. The statement was a comment on how the evidence thus far would impact its *decision regarding visits*, not on how the evidence would impact its final decision regarding termination. There is no evidence to show that the trial court's statement had any meaning other than whether to continue RV and DJV's visits, and there is no indication it shifted the burden of proof to respondents. Nor did the above statement discourage respondents from testifying, since the statement anticipated respondents' testimony at

a future hearing, and on the next hearing date respondent mother presented witnesses and testified at length herself and counsel indicated respondent father planned to testify the next day.

In summary, with regard to respondent father's allegation that he was denied a full, fair proceeding and adequate opportunity to be heard, the context in which the trial court's statements were made showed no plain error occurred. Even had respondent father misconstrued them as error, he does not point out in his brief on appeal, and it is not apparent on the record, how the outcome of the proceeding was prejudiced by the trial court limiting testimony to new evidence that had not previously been admitted, or by encouraging respondents to realistically consider foregoing visits with RV.

Respondent mother asserts she was denied procedural due process when petitioner failed to return SKV to her care along with JV and DV in May 2011, and in re-removing JV and DV from her care in August 2011 without providing her notice in the form of a petition. The trial court order following the March 16, 2011 review/permanency planning hearing stated:

> When the Family Reunification Program is in place in the home of the mother, the children, [SKV, JV and DV] shall be returned to her custody. The children, [DJV and RV], remain in their foster care placement where they continue to do well. Case management services remain ongoing.

Petitioner's May 20, 2011 Updated Service Plan, however, described what was ordered at the March 16, 2011, hearing as follows: "Court ordered that [JV] and [DV] be returned with FRP in place. * * *[SKV] may be returned home after the next reporting period." FRP began services in the home on April 12, 2011, and JV and DV returned to respondent mother's care in May 2011. SKV did not return home but spent weekends there because, as pointed out later during the termination hearing, "the Court agreed that he wouldn't go home immediately, because he was in the middle of school, and so that's why there were the weekends." At the next review/permanency planning hearing held June 7, 2011, petitioner reported concern for JV and DV's safety in respondent mother's home, stating she was overwhelmed caring for two children even with in-home FRP services, and recommended the goal change to termination. The trial court ordered at the June 7, 2011, hearing that SKV, RV and DJV remain in their foster placements. At the next review/permanency planning hearing held August 30, 2011, petitioner requested JV and DV's re-removal from respondent mother's care, the trial court received the updated service plan and caseworker's court report showing that remaining in respondent mother's care was contrary to their welfare, and they were re-removed that day.

Respondent mother must show error occurred when petitioner failed to return SKV and re-removed JV and DV without a petition, and that the error prejudicially affected the outcome of the proceeding. *Carines*, 460 Mich at 774; *Utrera*, 281 Mich App at 9. A review of the evidence shows no plain error occurred. The trial court ordered SKV, JV and DV returned home while FRP was in the home, but did not specify a date for return or state that all three children must be returned together. The evidence showed the parties agreed to wait to reunify SKV until the end of the school year, meanwhile giving him weekend visits with respondent mother. However, by the time the end of the school year approached the trial court had heard evidence at the June 7, 2011, hearing that respondent mother was overwhelmed by reunification with only

two of the children, and ordered that SKV remain in his foster placement. Given the facts of the situation, petitioner's failure to return SKV to respondent mother's care was not error.

In addition, re-removing JV and DV from respondent mother's care without providing her advance notice in a petition was not error. A petition was not required for re-removal because JV and DV remained under the trial court's jurisdiction and were properly removed pursuant to MCR 3.974 and MCR 3.975(E). The trial court is required under MCR 3.974(A)(1) to "periodically review the progress of a child not in foster care over whom it has retained jurisdiction," and MCR 3.974(A)(3) provides:

> Except as provided in subrule (B), the court may not order a change in the placement of a child solely on the basis of a progress review. If the child over whom the court has retained jurisdiction remains at home following the initial dispositional hearing or has otherwise returned home from foster care, the court must conduct a hearing before it may order the placement of the child. Such a hearing must be conducted in the manner provided in MCR3.975(E) . . .

MCR 3.975(E) in turn provides the requirements for dispositional review hearings, and review of the record shows the trial court complied with the requirements of that subsection at the August 30, 2011, review/permanency planning hearing. In addition, re-removal without providing advance notice in a petition was not unfair to respondent mother because the evidence showed she was present at the June 7, 2011, hearing and heard evidence indicating petitioner did not deem reunification successful and had changed its goal to termination. Even in the absence of a petition providing her advance notice, she had reason to know JV and DV would be re-removed from her care.

In summary with regard to respondent mother's allegation that she was denied a fair proceeding and adequate notice, no plain error occurred. Even if plain error occurred, respondent mother does not explain, and it is not apparent on the record, how not returning SKV along with JV and DV, or providing her advance notice of JV and DV's re-removal in the form of a petition, prejudicially affected the outcome of the proceeding.

Respondent mother next argues she was denied effective assistance of counsel. Respondent raises the issue of ineffective assistance of counsel for the first time on appeal. A claim of ineffective assistance of counsel should be raised by moving for a new trial or an evidentiary hearing, but may be raised for the first time on appeal if the details relating to the alleged ineffective assistance of counsel are sufficiently contained in the record to permit this Court to decide the issue. *People v Cicotte*, 133 Mich App 630, 636; 349 NW2d 167 (1984); *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). To establish a claim of ineffective assistance of counsel, respondent mother is required to show: (1) that her attorney's performance fell below an objective standard of reasonableness, and (2) the representation prejudiced her such that she was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To demonstrate prejudice, the 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 v Washington*, 466 US 668, 694; 104 S Ct 2052, 80 L Ed 2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694.

Respondent mother bases her claim of ineffective assistance of counsel on her attorney's failure to object when SKV was not returned to her care and when JV and DV were re-removed without a petition. However, as discussed previously, neither of those events constituted error or prejudiced the outcome of the proceeding, and therefore counsel was not ineffective in failing to object to them. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (citation omitted) (Counsel is not ineffective for failing to make a futile objection). Also, contrary to her assertion on appeal, her counsel did not admit error. Respondent mother was not denied effective assistance of counsel.

Lastly, respondent mother argues the trial court clearly erred in finding petitioner made reasonable reunification efforts. At the termination hearing, the reasonableness of services provided is relevant to whether the evidence is sufficient to terminate parental rights. See, e.g., *In re Newman*, 189 Mich App 61; 472 NW2d 38 (1991). Respondent mother alleges petitioner's failure to make reasonable efforts to reunify her with the children was demonstrated by the large number of caseworkers who serviced her case, petitioner's mistake in failing to return SKV, lack of adequate communication between the caseworker and SKV's counselor, the distance she needed to travel to visit the children, and the trial court's comment that there had been very poor case servicing during the proceeding.

The evidence showed there were numerous people involved in the attempt to reunify respondent mother with the children, but that three primary Starr Commonwealth caseworkers supervised this case for the majority of the 2009 proceeding, and that respondent mother's treatment plan goals remained consistent between 2009 and 2012, and indeed since 2004. There was no shortage of services and sheer man-hours provided in the attempt to reunifying her with the children, and a caseworker testified during the termination hearing that respondents had exhausted all available services. The evidence did not show that the number of caseworkers hindered reunification.

With regard to mistakes made by petitioner, as noted previously petitioner's failure to return SKV home was not a mistake and did not demonstrate petitioner's lack of effort to reunify, but rather showed he could not be returned home because the attempt to reunify JV and DV was unsuccessful. Respondent mother also argues that caseworkers failed to adequately communicate with the counselor who jointly counseled SKV and respondent mother. That counselor testified at the termination hearing that it had been difficult to obtain information from Starr Commonwealth regarding the reasons SKV had been removed, that additional information regarding reasons for removal would have aided SKV's counseling, and she would have developed a safety plan with him had she known he had experienced domestic violence. However, the evidence also showed respondent mother did not reveal to the counselor that SKV had been involved in incidents of domestic violence and struck by respondent father. The evidence does not show petitioner's failure to return SKV home or the level of caseworker communication with his counselor hindered respondent mother's reunification with the children, although it may have hindered SKV's counseling.

With regard to being required to drive large distances to visit the children, the evidence showed at the time of the termination hearing, SKV was placed in Kalamazoo where respondent

mother resided at times, JV and DV were placed in Albion and respondents drove to visit them, and RV and DJV were placed in Jackson and the foster parents transported them to visits. The evidence showed the children with the exception of DJV had significant special needs and required a superior level of parenting in their foster placements. JV and DV had extremely difficult behaviors and were placed with foster parents who had more than 30 years' experience parenting delinquent children. RV's significant developmental delays required a parent dedicated to applying therapeutic techniques in nearly every aspect of his everyday life. The extent of the children's special needs indicated that they would be difficult to place. Commendably, respondent mother consistently attended visits with all of the children, but she did not lack transportation and did not have regular employment around which she needed to rearrange her schedule. The necessity to drive to visit certain children did not hinder her reunification with the children.

With regard to the trial court's statement that the case was poorly serviced, the trial court judge who presided over this case from March 2009 through the time of the termination hearing noted he was impressed with caseworker and service providers' reports. The judge who assumed the case only for the termination hearing stated on the fourth day of the hearing that its decision would not "be easy because of the length of time and, quite honestly, because of the very poor casework in this case. Very poor. And I think everybody would have to honestly admit there was very poor casework in this case." The trial court judge expressed exasperation at various times during the termination hearing due to the number of years the case had lasted, lengthy testimony about details of respondent mother's parenting and the children's behaviors that seemed to be leading nowhere, and the seeming disconnect between respondent mother's testimony and the evidence presented by others. In its opinion, the trial court admitted it had "initially became impatient with the lengthy descriptions of the mother's parenting time and her difficulties controlling her children" but went on to say that the testimony took on new meaning when taken in context with respondent mother's "Pollyanna" approach to her parenting abilities.

In summary, the evidence over eight years showed petitioner provided numerous classes, group and individual counseling, and in-home, hands-on services appropriately designed to address respondent mother's lack of parenting skills, inability to keep an environmentally fit home, and denial of domestic violence and its effect on the children. It reunified the children with respondents in 2005, and attempted reunification of JV and DV with respondent mother in 2011. The evidence showed reunification was hindered not by petitioner's lack of reasonable effort, but by respondent mother's lack of benefit from services, and the trial court did not clearly err when it noted in its opinion:

> What we have is a nice, articulate and pleasant woman who does not appear to have any more of a clue after three plus years of services as to what type of home life is appropriate for her children than she did in 2004. This is indeed a rare case where the services offered accomplished almost nothing even though there was a multitude of them.

The trial court did not clearly err in finding petitioner had made reasonable reunification efforts.

The order terminating respondents' parental right to JV, DV, RV, and DJV is affirmed. The order terminating respondents' parental rights to SKV is conditionally reversed and remanded to the trial court for resolution of the ICWA-notice provision. The trial court shall respond to this issue within 87 days from the date of this opinion. We retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Christopher M. Murray