

STATE OF MICHIGAN  
COURT OF APPEALS

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UNPUBLISHED

August 29, 2013

In the Matter of DAVILA, Minors.

No. 313019

Oakland Circuit Court

Family Division

LC No. 2012-793577-NA

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Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Respondent-mother appeals by right from the trial court order that terminated her parental rights to the three minor children pursuant to MCL 712A.19b(3)(b)(ii) (failure to prevent abuse or injury), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood that child will be harmed if returned to parent). Because respondent was not prejudiced by the claimed ineffective assistance of her trial counsel, and because the trial court did not clearly err in finding that termination was in the children's best interests, we affirm.

The proceedings began when the trial court authorized a petition requesting the court to take jurisdiction of the minor children and terminate respondent's parental rights. According to the petition, respondent failed to protect her children from her husband's repeated sexual abuse. At the pretrial, respondent's attorney requested a trial on the petition. However, on the trial date, respondent tendered a no contest plea to the petition. A Department of Human Services (DHS) worker testified that respondent's husband repeatedly sexually abused the children from 2010 until December 2011, that respondent was aware of the sexual abuse and failed to protect the children, and that respondent continued to allow her husband to have contact with the children, even after she was informed of the sexual abuse. The court assumed jurisdiction over the children, found that statutory grounds for termination had been established by clear and convincing evidence, and set the matter for a best-interests hearing. Following the best-interests hearing, the court terminated respondent's parental rights. Respondent appealed by right.

Respondent first raises a claim of ineffective assistance of counsel. "[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2001), quoting *In re EP*, 234 Mich App 582, 597-598; 595 NW2d 167 (1999), overruled on other grounds by *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Findings on questions of fact are reviewed for clear

error, while rulings on questions of constitutional law are reviewed de novo.” *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To prevail on this claim of ineffective assistance of counsel, [respondent] must show that her trial counsel’s performance was deficient, i.e., she must show that counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced her that it denied her a fair trial. This necessarily entails proving prejudice to [respondent], which means that there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. [*In re CR*, 250 Mich App at 198 (citations and quotation marks omitted).]

Respondent argues that counsel erred in failing to inform her that her plea meant she was conceding the factual basis of the petition, i.e., that she was aware of the abuse and failed to protect her children. Ineffective assistance of counsel may be found when counsel fails to properly inform his client of the consequences of a plea. See *People v Douglas*, 296 Mich App 186, 205; 817 NW2d 640 (2012).

While we defer to counsel on matters of trial strategy, *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008), the record does not demonstrate that the respondent’s attorney possessed any strategic basis for admitting the allegations that were central to case and which respondent denies, namely that she was aware that her husband was sexually abusing the children and failed to protect them. Accordingly, respondent’s claim that her counsel was ineffective at the adjudication stage is not without merit. However, the record does not support respondent’s claim of prejudice. At the best-interests hearing, the referee permitted respondent to present evidence that she was unaware of the abuse perpetrated by her husband until December 26, 2011 and that she took prompt action to protect the children, including requiring her husband to leave the house, informing the Immigration and Naturalization Service of his behavior, and later filing for divorce and a personal protection order. The referee even directed that a second forensic interview be conducted with the eldest child to assist the court in determining whether and when respondent failed to protect her children. Thus, respondent has not established the she was prejudiced and, therefore, reversal on the basis of ineffective assistance of counsel is unwarranted.

Respondent next contends that the trial court clearly erred in concluding that termination was in the children’s best interests. Once the petitioner has established a statutory ground for termination by clear and convincing evidence, the trial court shall order termination of parental rights if the court also finds that termination of parental rights is in the best interests of the child. MCL 712A.19b(5). Whether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence. *In re Moss*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (2013), slip op at pp 3-6. The trial court’s decision regarding the children’s best interests is reviewed for clear error. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). “A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made.” *Id.*

The trial court found termination in the children’s best interests primarily because it believed that respondent failed to protect the children from the sexual and physical abuse that she

knew was occurring. The court concluded that respondent's behavior indicated a likelihood that she would fail to protect the children in the future. After reviewing the record, we are not left with a definite and firm conviction that the trial court erred in reaching this conclusion.

The interviews of the children sufficiently support the court's findings that respondent knew about the abuse long before she removed the children from the dangerous situation. The eldest child, aged nine and 10 at the time of her interviews, stated that respondent's husband repeatedly raped her over the course of two or three years. The child disclosed the abuse to respondent. After respondent confronted her husband, the abuse escalated. Despite the child's pleas, respondent continued to leave the eldest child alone with her husband. The child also described incidents of physical abuse. She concluded that she did not want to live with respondent in the future for fear that one of respondent's new boyfriends would abuse her as well.

The middle child, aged eight at the time of his interview, related several instances of sexual abuse, including one where respondent's husband anally raped him while he screamed. Respondent was in the home at the time and did nothing. The youngest child, aged six at the time of her interview, related an incident where the husband ejaculated on her back. She showed this to respondent, who wiped it off and remarked that her husband "was stupid." She also stated that respondent's husband beat her with a belt, leaving bruises. Respondent saw the bruises and admonished her husband, but the physical abuse continued unabated.

Even after respondent undisputedly learned of the abuse, she merely removed the children from her husband's access. She did not call the police or the DHS. She did not bring the children to a doctor and waited months to take them to a therapist. She refused to discuss the abuse with Child Protective Services workers. Instead, respondent and the children moved in with respondent's new boyfriend less than two months after leaving the husband. Respondent's actions demonstrate her inability to appreciate the level of harm, both physical and emotional, that her husband inflicted on the children. These actions support the trial court's finding that respondent would likely fail to protect the children in the future. Thus, the trial court did not clearly err in determining that termination of respondent's parental rights was in the children's best interests.

Affirmed.

/s/ Elizabeth L. Gleicher  
/s/ Jane M. Beckering  
/s/ Douglas B. Shapiro