

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* BALLENTINE/HOLLIDAY, Minors.

UNPUBLISHED  
September 30, 2014

No. 319607  
Kent Circuit Court  
Family Division  
LC Nos. 12-053855-NA;  
12-053856-NA

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Before: SHAPIRO, P.J., and WHITBECK and STEPHENS, JJ.

PER CURIAM.

Respondent-mother, acting *in propria persona*, appeals as of right the trial court order terminating her parental rights to the minor children JB and DH pursuant to MCL 712A.19b(3)(c)(i) (conditions of adjudication continue to exist), (c)(ii) (other conditions exist that could have caused the children to come within the court’s jurisdiction and they have not been rectified), and (3)(g) (failure to provide proper care and custody). Because respondent has not established error warranting relief, we affirm.

I. REMOVAL

Respondent first argues that it was improper to remove the children from her care. Specifically, she alleges that the trial court relied on “lies” when entering an ex parte order on November 16, 2012, which temporarily placed the children with the Department of Human Services (DHS) pending a preliminary hearing. Respondent also alleges that the ex parte order improperly relied on the allegation that respondent was using drugs when the results of her November 16, 2012 drug test were not obtained until after the temporary order was entered. It appears that respondent means to attack the trial court’s November 20, 2012 order, which was entered after the petition was authorized following the preliminary hearing. The November 20, 2012 order actually placed the children in foster care pending an adjudication trial based on a finding that the children would be at a “substantial risk” of harm in respondent’s care. See MCL 712A.13a(9). Respondent could have directly appealed that order, MCR 3.993(A)(1), but failed to do so. Because a direct appeal was available to respondent, she cannot now collaterally challenge the trial court’s order of removal in an appeal from the termination order. See *In re Hatcher*, 443 Mich 426, 436, 444; 505 NW2d 834 (1993). Moreover, we have reviewed respondent’s arguments concerning the removal and authorization of the petition and find them without merit.

## II. ADJUDICATION

Respondent argues that the trial court made several errors at the adjudication trial. Specifically, respondent argues that the trial court improperly relied on the testimony of a Child Protective Services worker when deciding to exercise jurisdiction over the children, that respondent's right to due process was violated at the adjudication trial, and that the trial judge was biased against her based on his determination that a portion of respondent's testimony at trial was not credible. Respondent further argues that the trial court improperly accepted the admissions and *nolo contendere* pleas of JB and DH's legal fathers at the adjudication trial and that there were not statutory grounds for adjudication. Finally, respondent alleges that she was unexpectedly called to testify at trial by her trial counsel. Respondent argues that this resulted in compelled self-incrimination and that counsel was ineffective for failing to inform her before the trial that she would be called to testify.

In making these arguments, respondent challenges the order of adjudication. However, because termination of respondent's parental rights occurred "following the filing of a supplemental petition for termination after the issuance of the initial dispositional order," respondent is not permitted to challenge the trial court's adjudication on an appeal from the order terminating her parental rights. *In re SLH*, 277 Mich App 662, 668; 747 NW2d 547 (2008). Respondent could have raised her asserted challenges in a direct appeal of right from the February 8, 2013 initial order of disposition, MCR 3.993(A)(1), but failed to do so. Because a direct appeal was available to respondent, she cannot now collaterally challenge the trial court's order of adjudication in an appeal from the termination order. See *In re Hatcher*, 443 Mich at 436, 444. In any event, we have again reviewed respondent's arguments and find them without merit.

## III. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent argues that her trial counsel was constitutionally ineffective.<sup>1</sup> In termination cases, this Court applies the principles of ineffective assistance of counsel as they have developed in the context of criminal law. See *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). "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010).

Respondent argues that counsel was ineffective because he advised her to comply with the service plan in order to regain custody of the children. However, nothing in the record

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<sup>1</sup> "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).

supports the assertion that counsel, in fact, told her to comply with the parent-agency agreement. Rather, respondent asserts that she “sent a complaint to the attorney general” and counsel was “cautioned” for making promises that [respondent] would get [her children back] if [she] complied to the parent agency agreement.” There is no evidence in the lower court record of respondent’s alleged complaint to the attorney general’s office regarding counsel’s representations or the attorney general’s alleged warning to counsel. Further, respondent does not cite authority to indicate that counsel’s alleged advice to comply with the service plan was improper. Thus, respondent has failed to establish that counsel’s conduct was objectively unreasonable. Further, given that a parent’s compliance with the parent-agency agreement is evidence of the parent’s ability to provide proper care and custody to a child, *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003), we fail to see how counsel advising respondent to follow the service plan would constitute ineffective assistance of counsel.

Respondent also argues that counsel was ineffective because he told her that there was “nothing” that he could do and failed to file motions and appeals on respondent’s behalf. Counsel represented respondent from the time of the November 20, 2012 preliminary hearing until August 16, 2013. Termination occurred on December 9, 2013. Thus, counsel represented respondent for the majority of the proceeding. On appeal, respondent does not identify what kind of motions counsel should have filed or what decisions he should have appealed during the time he represented her. Nor does she cite authority to support her allegation that his failure to do so was objectively unreasonable. Thus, respondent has failed to establish that counsel’s conduct was objectively unreasonable.

Further, there is no indication that, had counsel filed motions or appeals on respondent’s behalf, that there was a reasonable probability that the outcome of the proceeding would have been different. During the time that counsel represented respondent, she failed to comply with services, did not acquire employment, was hostile toward service providers and case workers, and abused illegal drugs. There is no indication on the record to suggest that any motions or appeals filed by counsel would have altered the outcome of the proceeding given respondent’s lack of cooperation and poor conduct during the time that counsel represented her. Because “[c]ounsel is not ineffective for failing to advocate a meritless position,” *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), respondent is not entitled to relief on her claims of ineffective assistance of counsel.

#### IV. BIAS

Respondent argues that reversal is warranted because both the legal guardian ad litem (LGAL) and her trial counsel were biased against her.

In asserting bias on the part of the LGAL, respondent cites the closing argument of the LGAL at the adjudication trial. However, respondent fails to recognize that the LGAL represented *the children* in the child protective proceeding. MCL 712A.13a(1)(f). Thus, the LGAL’s role was to advocate for the children’s interests, regardless of whether it negatively impacted respondent’s parental rights. Respondent also does not explain why the LGAL’s advocacy was improper. The LGAL’s role below was that of an advocate, not a decision maker, see MCL 712A.13a(1)(f), and, thus, respondent’s argument that the LGAL’s alleged bias constituted error requiring reversal is entirely unsupported.

With regard to her trial counsel, respondent alleges that counsel was biased because he reported to the “attorney commission” that there was reason to believe that respondent used drugs because she had “meth teeth.” There is no evidence in the lower court record to support that counsel made such a statement to the “attorney commission.” Further, respondent does not explain how counsel’s alleged bias affected the proceedings below. Further, allegations concerning bias are usually raised in the context of a trial judge’s bias against a party or a party’s attorney. See *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001). Because counsel was appointed to represent respondent’s interests, see *Barkley v Detroit*, 204 Mich App 194, 203-204; 514 NW2d 242 (1994), not to be a decision maker, respondent’s argument that counsel’s alleged bias constituted error requiring reversal is irrelevant given her arguments regarding the alleged ineffective assistance of her counsel.

## V. STATUTORY GROUNDS

Respondent next argues that the trial court improperly found statutory grounds to terminate her parental rights to the children.<sup>2</sup> A trial court may terminate a respondent’s parental rights if it finds that (1) a statutory ground under MCL 712A.19b(3) has been established by clear and convincing evidence and (2) that termination is in the children’s best interests. MCR 3.977(F); *In re CR*, 250 Mich App 185, 194-195; 646 NW2d 506 (2001).

The trial court properly terminated respondent’s parental rights pursuant to MCL 712A.19b(3)(g). MCL 712A.19b(3)(g) provides that termination is proper where “[t]he parent, without regard to intent, fails to provide proper care or custody for the child[ren] and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child[ren]’s age[s].”

Here, respondent was unable to provide proper care and custody to the children at the beginning of the proceeding because she was using illegal substances, was mentally unstable, and had failed to properly supervise the children, which resulted in a house fire. Throughout the proceeding, respondent failed to address concerns regarding her substance abuse, history of domestic violence, and mental instability. She did not consistently attend counseling and never submitted proof that she was attending Narcotics Anonymous meetings. In June 2013, respondent tested positive for amphetamines and marijuana while she was pregnant with a third child.<sup>3</sup> Respondent failed to submit to substance screenings in the months leading up to the December 2013 termination. She failed to obtain employment during the 12-month proceeding and was receiving financial support from her live-together partner, with whom she had an unstable relationship, and the State at the time of termination. Although respondent completed a

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<sup>2</sup> “This Court reviews for clear error the trial court’s ruling that a statutory ground for termination has been established and its ruling that termination is in the children’s best interests.” *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.*

<sup>3</sup> That child was not part of this proceeding.

nine-week parenting class in September 2013, she did not benefit from the class and her parenting time was suspended in October 2013 because of the children's reactions to her poor behavior. At the time of termination, respondent was unable to redirect the children and lacked proper communication skills. *In re CR*, 250 Mich App 185, 196; 646 NW2d 506 (2002), overruled on other grounds by *In re Sanders*, 495 Mich 394; \_\_\_ NW2d \_\_\_ (2014). Thus, the record supports that respondent was unable to provide proper care and custody at the time of termination.

Further, given respondent's history and lack of commitment during the proceeding, there is no indication in the record that she would obtain employment and comply with and benefit from services within a reasonable time. There was evidence that, even if respondent did begin to comply, she would likely require one to two years of additional counseling. At the time of termination, JB was over 5-1/2 years old, DH was three years old, and both children required permanency in the near future. Accordingly, the trial court did not clearly err by finding that statutory grounds to terminate respondent's parental rights under MCL 712A.19b(3)(g) had been proven by clear and convincing evidence.<sup>4</sup>

## VI. BEST INTERESTS

Respondent next argues that the trial court improperly determined that termination was in the children's best interests. "Once a statutory ground for termination has been proven, the trial court must find that termination is in the child[ren]'s best interests before it can terminate parental rights." *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "In deciding whether termination is in the child[ren]'s best interests, the court may consider the child[ren]'s bond to the parent, the parent's parenting ability, the child[ren]'s need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App at 41-42 (internal citations omitted).

The record establishes that the children did not have a healthy bond with respondent. During the proceeding, respondent inappropriately discussed the case with the children, often became frustrated and aggressive when the children were present, behaved inconsistently during visits, and failed to interact with the children at times. Respondent was late to and missed visits despite being told that it negatively affected the children. JB had anxiety, was afraid of respondent's reactions, and was concerned by respondent's changes in mood and behavior. In the months leading up to termination, JB believed that respondent would "forget about her" and no longer "love her" after respondent gave birth. DH lived with her legal father and his fiancé for a majority of the proceeding. DH referred to her father's fiancé as "mommy" and respondent as "mommy Bana." The record supports that DH did not always view respondent to be her "mom." In the months leading up to respondent's parenting time being suspended, JB had emotional difficulties after parenting times, wet the bed several times, and reported that she did not think it was safe to return to respondent's home. At times, DH's needs were ignored by

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<sup>4</sup> Because we have concluded that at least one ground for termination existed, we need not specifically consider the additional grounds upon which the trial court based its decision. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009).

respondent and DH had “screaming fits” and behaved differently for almost 24 hours after visitations. After parenting time was suspended, these issues with the children were resolved.

The record further establishes that the children required permanency, stability, and safety within a reasonable time and that respondent could not provide this to the children. The children had been in care in a previous proceeding and JB needed permanency given her anxiety and the fact that she wanted the proceedings to be “over.” DH was happy in the home of her father and JB was “very bonded” to her foster parents, who were interested in adopting her. Thus, the trial court did not clearly err in finding that termination of respondent’s parental rights was in the children’s best interests.

Affirmed.

/s/ Douglas B. Shapiro  
/s/ William C. Whitbeck  
/s/ Cynthia D. Stephens