

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* GIESKEN, Minors.

UNPUBLISHED  
November 13, 2014

No. 320303  
Mecosta Circuit Court  
Family Division  
LC No. 13-005979-NA

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Before: M. J. KELLY, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

In these consolidated appeals, respondent father and mother appeal by right the trial court's order terminating their parental rights to the minor children. The court terminated respondent father's parental rights under MCL 712A.19b(3)(g), (h), (j), and (n)(i), and terminated respondent mother's parental rights under §§ 19b(3)(b)(ii), (g), (j), and (l). Because we conclude there were no errors warranting relief in either appeal, we affirm both.

I. BASIC FACTS

The Department of Human Services removed the children from the home after respondent father was accused of sexually assaulting a nine-year-old visitor and returned to the home in violation of the Department's safety plan. The Department placed the children in foster care.

At a jury trial to determine jurisdiction, respondent mother admitted she had been convicted of child abuse in connection with a previous case, and that her parental rights to two other children were terminated in that case.<sup>1</sup> She denied that respondent father touched the nine-

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<sup>1</sup> Respondent mother maintained that she voluntarily released her parental rights to her other children, but the Department demonstrated that this was not the case.

year-old visitor to their home and opined that the child fabricated the story. She also denied that there had been domestic violence between her and respondent father. She asserted that school officials and others, including a detective and the Department's staff, had conspired to make false accusations against her and respondent father.

A child abuse and neglect pediatrician evaluated the children and found that they were morbidly obese. A psychologist evaluated the children and diagnosed them with post-traumatic stress disorder (PTSD), which the psychologist attributed to the children's exposure to altercations in the home. The psychologist also evaluated respondent mother and diagnosed her with dependent personality disorder, which tended to make her stay in situations that were detrimental to her children. The psychologist had serious concerns about respondent mother's ability to protect the children.

The jury found that grounds existed warranting the trial court's exercise of jurisdiction over the children. The Department asked the trial court to terminate respondents' parental rights at the initial dispositional hearing. In delivering its decision, the trial court noted that, because the Department requested termination at the initial dispositional hearing, it was not required to make reasonable efforts to reunite the children with respondents. The court also acknowledged that respondent father was incarcerated and respondent mother had her parental rights to two other children terminated in a prior proceeding.

The trial court found clear and convincing evidence to terminate respondent mother's parental rights under § 19b(3)(b)(i) because the evidence showed that respondent mother had the opportunity to prevent sexual abuse to a sibling of the children but failed to do so, and there was a reasonable likelihood that the children could suffer injury if returned to the home. The court found that respondent mother had a dependent personality disorder and a long history of placing her needs before the needs of her children. The trial court stated that respondents believed that the allegations of criminal sexual conduct against respondent father resulted from a conspiracy, and that neither parent had acknowledged any responsibility for the incident with the nine-year-old girl. In addition, the court found that clear and convincing evidence existed to terminate respondent mother's parental rights under §§ 19b(3)(i) and (l) because her parental rights to two other children had been terminated and the circumstances involved serious or chronic neglect or abuse, and previous attempts to rehabilitate her had been unsuccessful. The court rejected respondent mother's assertion that she had released her parental rights to those children.

The trial court found that clear and convincing evidence existed to terminate respondent father's parental rights under § 19b(3)(h) because he would be imprisoned for more than two years and had not provided for proper care and custody of the children.<sup>2</sup> The trial court also found that termination was appropriate under § 19b(3)(n)(i) because respondent father had been convicted of assault with intent to commit second-degree criminal sexual conduct and continuation of the parent-child relationship would be harmful to the children.

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<sup>2</sup> Respondent father pleaded guilty to assault with intent to commit second-degree criminal sexual conduct. MCL 750.520g(2). The trial court sentenced him to serve 3 to 10 years in prison.

The court further found that clear and convincing evidence supported termination of both respondents' parental rights under § 19b(3)(g) because they failed to provide proper care and custody for the children and likely would not be able to do so within a reasonable time considering the children's ages. The court noted that respondent mother had a long history of involvement with the Department, had her parental rights to other children terminated, and seemed unable to exercise sound judgment with respect to relationships, that the children had witnessed domestic violence and had been diagnosed with PTSD, and that the parents refused to take any responsibility for the children's weight issues. The court also found that the evidence supported termination of both respondents' parental rights under § 19b(3)(j) because it was reasonably likely that the children would be harmed if returned to their home.

The trial court also found that termination was in the children's best interests. The court acknowledged that the children and the parents shared a bond, but stated that the children had adjusted well to the separation from their parents. The evidence showed that the children were doing well in school, had lost weight, felt secure about their futures, and wanted to stay with their foster family. The court found that respondents engaged in domestic violence in the presence of the children, and that respondent mother failed to place the children's needs ahead of her own. The court found that respondent father could not provide for the children because he was incarcerated, and that respondent mother showed no independent capacity to provide for the children. The court noted that both parents had criminal histories and refused to take responsibility for their behavior.

The trial stated that it had considered alternatives to termination, but that neither respondent had identified any suitable relative who could care for the children. For these reasons, it found that termination of parental rights was in the children's best interests.

## II. DOCKET NO. 320303

Respondent father, arguing on his own behalf, maintains that the trial court erred when it permitted the admission of hearsay statements by his children.<sup>3</sup> Because respondent father's lawyer did not object on this basis, we shall review the claim for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008).

Respondent father objects to the admission of several statements via the testimony of three witnesses. However, he has not identified the statements to which he objects, and does not explain how the statements amount to inadmissible hearsay. An out-of-court statement is hearsay only if it is offered to prove the truth of the matter asserted. MRE 801(c). And, although hearsay is generally not admissible, MRE 802, there are exceptions. See MRE 803; MRE 803A; MRE 804(b). Because respondent father failed to identify any of the statements that he believes were inadmissible, this Court cannot determine whether the statements were hearsay or whether any of the statements might fall within an exception. By failing to properly support

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<sup>3</sup> Respondent father asserts that one child's statements were inadmissible under the tender years exception, see MCR 3.972(C)(2), but the Department did not seek admission under that rule.

this argument on appeal, respondent father has abandoned it. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). There was no plain error.

Next, respondent father complains that he was not permitted to call his children as witnesses. The trial court refused to allow the children to testify in court, finding that the children would be traumatized by facing their parents in open court. Respondent father does not challenge this ruling, but argues that his lawyer was ineffective for not arranging to have the children testify by deposition, videotape, or other method as provided in MCL 600.2163a.

Because there was no hearing on this issue, our review of this issue is limited to mistakes apparent on the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). The standards for ineffective assistance of counsel in criminal cases apply by analogy in termination cases. See *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2001), overruled not in relevant part *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014). To establish ineffective assistance of counsel, respondent father must show that his lawyer's performance fell below an objective standard of reasonableness under prevailing professional norms and prejudiced his trial. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). To establish prejudice, he must show a reasonable probability that, but for the error, the result of the proceeding would have been different. *Id.* at 600.

Respondent father cannot rely on MCL 600.2163a, because that statute only applies to criminal cases involving charges of criminal sexual conduct, child abuse, and child sexually abusive activity. See MCL 600.2163a(2). Moreover, although respondent father argues that he should have been allowed to examine the children regarding statements they allegedly made to other witnesses, he does not offer any indication as to how the children might have testified. Without a showing of what information the children would have provided, there is no basis for concluding that his lawyer's failure to arrange for their testimony by deposition or video prejudiced respondent father's trial.

Respondent father also argues that the trial court denied his right to due process by preventing him from testifying regarding the alleged conspiracy to fabricate criminal sexual conduct charges against him.<sup>4</sup> He asserts that the allegation that the children were morbidly obese was a ruse designed to remove them from the home. He claims too that the evidence showed the children have a condition that caused their obesity and that new evidence establishes that no abuse occurred.

Respondent father did not argue below that his right to due process was violated because the trial court prohibited him from offering evidence of a conspiracy. Further, he did not seek relief below based on new evidence or allegations of corruption and collusion. Accordingly, our review is for plain error. *In re Utrera*, 281 Mich App at 8-9.

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<sup>4</sup> The trial court granted appointed counsel's motion to withdraw.

The record does not support respondent father's assertion that he and respondent mother were not able to testify about the alleged conspiracy. Both respondents were permitted to testify regarding their belief that various persons were conspiring against them or lying. The trial court acknowledged that testimony, but rejected it as incredible. We defer to the trial court's special opportunity to judge the credibility of the witnesses who appear before it. *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011).

The record also shows that whether the children's obesity resulted from a medical condition was explored at trial. Respondent father has pointed to no new evidence that establishes that the children gained weight due to a genetic disorder or a thyroid condition.<sup>5</sup> Further, although the children's weight issue was a factor in the trial court's decision to terminate respondent father's parental rights under § 19b(3)(g), it was not central to the court's determination. The weight issue did not enter into the trial court's finding that clear and convincing evidence existed to terminate respondent father's parental rights under the other specified subsections. Accordingly, this issue does not warrant relief.

Respondent father raises two additional issues that pertain solely to respondent mother. He complains that she was not provided with a case service plan, and that the Department failed to provide her with notice under MRE 404(b)(2) of its intent to introduce evidence of her prior conviction for child abuse. "Generally, persons do not have standing to assert constitutional or statutory rights on behalf of another person." *In re HRC*, 286 Mich App 444, 458; 781 NW2d 105 (2009); see also *In re Terry*, 240 Mich App 14, 21; 610 NW2d 563 (2000). Any entitlement that respondent mother may have had to a case service plan involves a personal right belonging only to her and any deficiency in this regard affected only the trial court's authority to terminate respondent mother's parental rights. Respondent father cannot demonstrate that he sustained an injury from any failure on petitioner's part to provide a case service plan to respondent mother. Thus, he lacks standing to raise this issue. See *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 292; 715 NW2d 846 (2006).

Similarly, although respondent father complains about the Department's failure to provide notice under MRE 404(b)(2), he does not explain how he sustained an injury from that failure. Because this evidence concerns respondent mother, we conclude that respondent father lacks standing to contest it. Even if respondent father did have standing to raise this issue, any error would not warrant relief.

To the extent that the evidence was subject to MRE 404(b), the notice provision of that rule states that it applies "in a criminal case." See MRE 404(b)(2). Thus, the alleged failure to provide the notice was not plain error. Second, respondent father had actual notice of the Department's intent to submit this evidence. The original petition alleged that respondent mother had a prior conviction for third-degree child abuse and petitioner relied on that allegation in support of its requests for jurisdiction over the children and termination of respondents'

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<sup>5</sup> We note that respondent father has improperly submitted various records and documents that were not presented in the trial court. See *In re Rudell Estate*, 286 Mich App 391, 405; 780 NW2d 884 (2009).

parental rights. This allegation placed respondents on notice that petitioner would present evidence of respondent mother's prior conviction. Accordingly, respondent father's substantial rights were not affected. Contrary to what respondent father argues, the failure to file any pretrial notice did not preclude him from objecting to this evidence when it was offered.

Finally, we reject respondent father's argument that trial counsel was ineffective for failing to raise or preserve the issues discussed above. His arguments either lack merit or he lacks standing to raise the issues. Counsel does not render ineffective assistance by failing to raise meritless arguments. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

### III. DOCKET NO. 320339

Respondent mother argues that the trial court erred by relying on excluded evidence to find that clear and convincing evidence established one or more statutory grounds for termination. Contrary to what respondent mother argues, the trial court did not exclude respondent father's prior criminal sexual conduct conviction. Respondent mother has confused evidence that respondent father had a prior conviction for criminal sexual conduct with evidence of the facts underlying that conviction. At the jury trial, the Department moved under MRE 404(b) to place evidence of the facts underlying the prior conviction before the jury. The trial court excluded the evidence. However, in the original petition the Department alleged that respondent father had a prior conviction for criminal sexual conduct and was a registered sex offender. The trial court relied on the fact of the conviction itself, not on the excluded evidence regarding the facts underlying that conviction, in finding that statutory grounds for termination were established by clear and convincing evidence. The trial court did not improperly rely on legally inadmissible evidence to find that the statutory grounds for termination were established.

Finally, respondent mother argues that the Department failed to make any substantial effort to investigate possible relative placements for the children, in particular placement with respondent father's brother. Because respondent mother did not raise this issue below, our review is for plain error. *In re Utrera*, 281 Mich App at 8-9. We review the trial court's findings of fact for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 3.977(K).

The Department must generally determine if suitable relative placement is available for the child. MCL 722.954a(2). The record shows that the Department investigated the possibility of relative placement, but no suitable relatives were available. The relatives were either unable or unwilling to care for the children. Respondent mother maintains that respondent father's brother was willing to care for the children. However, the trial court found that respondent mother never provided the Department with his contact information. This finding is supported by the caseworker's testimony that she repeatedly asked respondent mother for contact information for this relative, but respondent mother never provided the information. Accordingly, the trial court did not clearly err in finding that no suitable relative placement was available for the children.

There were no errors warranting relief.

Affirmed in both dockets.

/s/ Michael J. Kelly  
/s/ Jane M. Beckering  
/s/ Douglas B. Shapiro