

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of HANNAH MARIE GUNTLE and  
ADRIANNA NIKOL BURCH, Minors.

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

V

AMELIA KAY BURCH,

Respondent-Appellant,

and

EDDIE MALLORY,

Respondent.

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In the Matter of HANNAH MARIE GUNTLE,  
Minor.

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

V

TRAVIS MARK GUNTLE,

Respondent-Appellant,

and

AMELIA KAY BURCH,

Respondent.

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UNPUBLISHED  
October 12, 2006

No. 269023  
Cass Circuit Court  
Family Division  
LC No. 04-000127-NA

No. 269889  
Cass Circuit Court  
Family Division  
LC No. 04-000127-NA

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

PER CURIAM.

In these consolidated appeals, respondent mother Amelia Burch appeals as of right from the trial court order terminating her parental rights to Hannah Guntle and Adrianna Burch under MCL 712A.19b(3)(c)(i), (g), and (j), and respondent father Travis Guntle appeals as of right from the trial court order terminating his parental rights to Hannah Guntle under MCL 712A.19b(3)(g) and (h). We affirm the order terminating respondent father's parental rights, reverse the order terminating respondent mother's parental rights, and remand for further proceedings regarding respondent mother's parental rights.

The trial court clearly erred in finding that the statutory grounds for termination of respondent mother's parental rights were established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). During the 14 months between the initial disposition and termination hearings, respondent mother did not completely and permanently rectify the conditions of emotional instability caused by enmeshment with her own mother, impulsive decision making, financial insecurity and dependence, and inadequate parenting of a strong-willed child. The trial court was correct in being sensitive to the length of time the children had been in foster care, but under the particular facts of this case the court should have allowed this motivated respondent mother additional time to benefit from services.

Respondent mother effectively managed her depression, had no significant mental health or substance abuse issues, had good to average parenting skills and could keep a clean home and organized schedule, had the intellectual ability to understand and apply concepts taught, participated consistently in counseling from the outset of this proceeding and made some progress in recognizing and making less impulsive decisions, sought and obtained employment and independent housing, achieved a measure of financial independence, and desired to set boundaries for her mother and improve their relationship. The evidence showed that respondent mother would never completely sever the relationship with her mother, but they no longer resided together, and her mother traveled for long periods of time and did provide some element of positive support. Respondent mother would struggle financially, but she knew how to access public assistance. Hannah had a powerful, strong-willed, oppositional personality, but respondent mother's parenting skills were described as good and the dire prediction that Hannah would become a juvenile delinquent if parented by respondent mother was not based on clear and convincing evidence.

The evidence showed that respondent mother could provide basic proper care and custody for the children, was motivated to improve, made some progress, and would likely make better decisions as she matured. The evidence was not clear and convincing that the children would likely suffer harm in respondent mother's care.

The trial court did not clearly err in finding that the statutory grounds for termination of respondent father's parental rights were established by clear and convincing evidence. MCR 3.977(J); *Miller, supra* at 337. Respondent father was incarcerated shortly after Hannah's birth, had never provided her primary care or support, and his release date from prison was uncertain. He had been incarcerated the majority of the time since he was 16 years old. There was no

reasonable expectation that the ideal scenario, under which he would be paroled in November 2006, become immediately compliant with and benefit from services, and become able to provide proper care for Hannah within a reasonable time following his release, would occur.

The trial court erred in determining that termination of respondent mother's parental rights was not clearly contrary to the children's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). First, the court should not have reached this decision because the statutory grounds for termination of respondent mother's parental rights were not established. Moreover, while the trial court was correct in being sensitive to the length of time the children had been in foster care, the evidence showed that reunification between respondent mother and Hannah could have been achieved during the course of this proceeding, as recommended by Families First in April 2005, and that Adrianna's removal in July 2005 may not have been necessary. Had reunification been achieved, the lengthy foster stay would not have been an issue, and trial court would have been in a better position to assess respondent mother's ability to provide proper care for two children and whether the children were likely to suffer harm in her care.

The trial court did not err in determining that termination of respondent father's parental rights was not clearly contrary to Hannah's best interests. MCL 712A.19b(5); *Trejo, supra* at 356-357. Respondent father had no meaningful contact with Hannah since she was an infant, and Hannah could not have been bonded to him. There was no reasonable expectation that he would provide her with proper care within a reasonable time, and Hannah's paternal grandmother declined to provide temporary custody while he was incarcerated.

Respondent father also asserts on appeal that the trial court abused its discretion in denying his counsel's motion to withdraw, and that he was denied effective assistance of counsel because counsel failed to prepare a writ for his appearance at his termination hearing so that he could assist in his defense, failed to communicate his desires to the trial court, gave a completely ineffective closing argument that contradicted his desires, failed to call witnesses to establish a defense, and failed to object to admission of harmful hearsay evidence.

This Court reviews a trial court's decision regarding substitution of appointed counsel under an abuse of discretion standard. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of bias. *Phillips v Jordan*, 241 Mich App 17, 29; 614 NW2d 183 (2000). Appointment of substitute counsel is warranted only upon a showing of good cause and if substitution will not unreasonably disrupt the judicial process. *Traylor, supra* at 462. Good cause to substitute counsel exists if a legitimate difference of opinion develops between a defendant and his appointed counsel regarding a fundamental trial tactic. *Id.*

In this case, there was no good cause to order substitute counsel. Respondent father argues on appeal that "it appears" that there was a genuine disagreement between respondent father and counsel regarding the defense but does not further elucidate the nature or substance of that disagreement in his appellate brief, or how the alleged disagreement affected the outcome of the termination hearing. The difficulty, as noted by the trial court, was respondent father's inability to handle a courtroom setting. The trial court denied respondent father's request because the problem in communication lay with respondent father and not with counsel, and

therefore substitute counsel would not be any more effective. No fundamental trial tactic was at issue, there was no evidence that the trial court acted out of perversity of will, and its decision to deny substitution of counsel was not violative of fact or logic.

Respondent father was not denied 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). This Court reviews constitutional issues de novo. *Kampf v Kampf*, 237 Mich App 377, 381; 603 NW2d 295 (1999). Preserved constitutional issues are reviewed for harmless error beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Counsel was not ineffective in failing to assure respondent father's physical presence at the termination hearing, in failing to adequately convey respondent father's desires to the trial court, or in giving a closing argument that contradicted respondent father's desires. Respondent father was present at the termination hearing via speakerphone and his counsel was physically present. The trial court received all of respondent father's evidence, and the outcome of the hearing was not prejudiced by lack of respondent's physical presence. With regard to communicating respondent father's desires, respondent father characterizes his decision to release his parental rights as a "surprise move." Respondent father expressed conflicting desires when he stated that he would release his parental rights and then appeal that termination. Respondent father, himself, was not certain what he wanted to do, and therefore counsel was unable to communicate respondent father's desires to the trial court. Once the trial court decided to proceed with a full hearing, counsel correctly treated the matter as contested and elicited evidence showing why respondent father's parental rights should not be terminated.

Counsel was not ineffective in failing to call the paternal grandmother or respondent father's girlfriend as defense witnesses. 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). In this case, failing to call these witnesses did not affect the outcome of respondent's termination hearing. The paternal grandmother declined to take temporary custody of Hannah in order to keep Hannah and Adrianna in placement together, and thus she would not have testified to her willingness to provide alternate custody during respondent father's imprisonment. Respondent father's girlfriend had been in a relationship with him for the past two years, during which time he had been imprisoned and unable to perpetrate violence upon her, so her possible testimony regarding his lack of violence would have had virtually no weight. Testimony regarding respondent father's commitment to Hannah would also have had little weight, because termination was based on respondent father's inability to properly care for her, not his general level of commitment to her.

Counsel was not ineffective in failing to object to hearsay evidence. The only hearsay evidence noted by respondent father in his appellate brief was the caseworker's brief statement that there was no bonding between Hannah and respondent father. Even in the absence of this statement, other evidence showed that Hannah could not have been bonded to him because he became incarcerated during her infancy. Respondent father also argues that his parental rights were terminated upon new facts not alleged in the original petition, and that legally admissible evidence required to establish them was not presented. The first amended petition filed June 15, 2004 alleged respondent father's incarceration. Additional facts later alleged in the termination

petition were his criminal history and denial of parole in November 2005, both of which respondent father related in testimony, thus establishing them by legally admissible evidence.

Counsel's performance was not prejudicially deficient, and under an objective standard of reasonableness counsel did not make any error so serious that he was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). No error occurred that adversely affected the outcome of respondent father's termination hearing. Since no prejudicial error occurred, review under the harmless error standard is not required.

Affirmed in part and reversed in part. Remanded for provision of additional services and further proceedings with regard to respondent mother. The children's temporary wardship should continue, and respondent mother should be provided full reunification services. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Kurtis T. Wilder

/s/ Deborah A. Servitto