

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

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In the Matter of KINGSTAD, Minors.

UNPUBLISHED  
January 14, 2014

No. 316209  
Alcona Circuit Court  
Family Division  
LC No. 10-002521-NA

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Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

The Department of Human Services (DHS) took the respondent-mother's three children into care upon court order because respondent's severe and untreated mental health issues prevented her from protecting her children and providing them with proper care and custody. The DHS has not sought termination of respondent's parental rights and continues to offer respondent reunification services despite her repeated refusals to cooperate with the authorities.

Respondent now appeals the circuit court's removal order following the four-day trial. She also challenges the propriety of the circuit court's ex parte communication with her children on May 9, 2013, and decision to conduct a dispositional review hearing in her absence after jailing her for contempt of court. Finally, respondent asserts that her court-appointed attorney was constitutionally ineffective. We discern no errors and therefore affirm.

**I. BACKGROUND**

Respondent is the mother of two teenagers, MK and DK, and a preschool-aged son, SK. Respondent has a long history with Child Protective Services (CPS), including 17 abuse and neglect complaints over the years. On November 30, 2010, CPS received a complaint that respondent's home was unsanitary and unsafe for young SK. Respondent suffers from severe mental illness that causes paranoia and makes her oppositional to authority. She refused CPS and the DHS access to her children and home and rejected attempts to provide her with services.

On August 16, 2012, the DHS sought removal of the children from respondent's care. The previous month, respondent had packed MK's bags and locked her out of the house. MK telephoned her maternal grandmother and upon the grandmother's arrival, respondent physically assaulted them both. When a caseworker again offered services to respondent, she declared, "The only prevention service I need is one that prevents you from being in my driveway." During the hearing on the matter, respondent repeatedly interrupted the proceedings to challenge the facts elicited through the testimony of witnesses. The circuit court denied the petition for

removal of the children at that time. The court ordered CPS to appoint a new caseworker and asked respondent to “[p]lease cooperate with that investigation” but found no evidence that the children were in imminent danger.

A month later, the DHS filed an amended petition seeking removal of the children from respondent’s care because she still refused to cooperate with services or allow the DHS access to her privately-obtained mental health records, and a passer-by discovered then three-year-old SK standing on a busy roadway while respondent slept inside her home. The court found probable cause that the allegations in the petition were true and the case proceeded to a trial before a jury.

The trial was not conducted until March and April 2013. In the meantime, respondent discontinued services with her psychiatric nurse practitioner because she disagreed with his unauthorized decision to share her medical records with the DHS. Respondent eventually agreed to participate in services, but only with workers of her choosing. She subsequently discontinued all services after becoming hostile and aggressive with the workers. Respondent repeatedly interrupted hearings conducted by the court in anticipation of the trial. The circuit court judge became frustrated with respondent. Respondent then sought disqualification of the judge, but her motion was denied.<sup>1</sup>

During the four-day trial, petitioner presented testimony from school officials, respondent’s former psychiatric treatment provider and various caseworkers and law enforcement officers involved with the family. Respondent’s mother and older children testified as well. At the conclusion of the trial, the jury found cause to believe by a preponderance of the evidence that at least one of the allegations in the petition was true.

Immediately following the conclusion of the trial, petitioner moved to review the initial placement orders, and the circuit court held an interim placement hearing. At the hearing, petitioner recommended that respondent’s two eldest children be placed with their grandmother, and that young SK be left with his mother, at least temporarily. The circuit court ordered all three children removed from respondent’s home, and SK was placed in foster care.

Following the children’s placement outside of the home, respondent remained uncooperative. Law enforcement had to be summoned when respondent became hostile and aggressive toward a caseworker before a supervised parenting time session at the courthouse. At a May 9, 2013 dispositional hearing, respondent disrespected and disrupted the court, leading to her being held in contempt and immediately taken to jail.

## II. REMOVAL OF THE CHILDREN

Respondent first challenges the removal of her children from her care. Specifically, respondent contends that the court was biased against her and “reache[d] beyond the testimony presented” to remove SK when the DHS had not recommended such action. The court had heard

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<sup>1</sup> Respondent has not appealed the circuit court’s refusal to disqualify the judge presiding over this case.

all the evidence and found that the hostility in the home must be having a dangerous psychological impact on SK despite that “[i]t might appear that he’s used to it.”

The parties to this appeal argue the propriety of the children’s removal based upon the criteria in MCR 3.965 and MCR 3.966. Those court rules only apply to removal proceedings before adjudication, however. As respondent’s children were not removed from her care until after the trial, these rules are inapposite. “In the absence of a court rule or statute,” an issue regarding a child’s placement “following adjudication and before the filing of a petition to terminate parental rights is left to the sound discretion of the trial court and is to be decided in the best interests of the child.” See *In the Matter of Laster*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket Nos. 315028 and 315521, issued December 26, 2013), slip op at 3. We review a court’s best-interests determination for clear error. *In re Trejo*, 462 Mich 341, 357; 612 NW2d 407 (2000). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with the definite and firm conviction that a mistake has been made. *In re Pardee*, 190 Mich App 243, 250; 475 NW2d 870 (1991).

The circuit court did not clearly err in finding that removal of the children from their mother’s home was in their best interests. Petitioner presented extensive evidence regarding the risk of harm all three children faced if maintained in their mother’s home. Respondent suffered from myriad mental health issues. Her mental health treatment provider had been unable to discern the right prescription drug treatment plan to stabilize respondent’s condition. The nurse practitioner testified that respondent’s use of alcohol and medical marijuana likely detracted from the prescription medications’ usefulness. And it appears that respondent stopped all treatment partway through the proceedings. Respondent was angry that the nurse practitioner shared her medical records with the DHS and there is no indication that she pursued treatment with an alternative provider.

Additional evidence revealed that respondent’s mental health issues rendered her agoraphobic and she would lock herself in her bedroom for extended periods of time, leaving the children without supervision. The inability to regulate her medications also left respondent exhausted. During one of respondent’s long midmorning slumbers, SK escaped from the house and was found wandering in the middle of a busy roadway. Respondent also was not supervising her teenage children. Both were failing their classes and refused to complete assignments. MK and DK ran away several times, maliciously destroyed the house, and brought inappropriate guests into the home.

Respondent exhibited hostility and violence toward her older children, her mother, and even workers involved in the case. It was reasonable for the circuit court to believe that SK was harmed by the ongoing turmoil in his home and could be the target of future hostility and aggression.

Moreover, respondent had rejected repeated efforts to provide her with services and often would not even allow workers to visually assess the safety of her children. The court was in a position of last resort and had to remove the children so respondent could focus on her own health. The older children were placed with their maternal grandmother, the person they had looked to for protection from their mother in the past. Given SK’s youth and the strain his care would have placed on the grandmother, he was placed in interim foster care.

Based on the exhaustive record created at the four-day trial, the circuit court did not commit clear error in removing the children from respondent's care. Removal at that time was in the children's best interests.

### III. CONDUCTING HEARING IN RESPONDENT'S ABSENCE

Respondent argues that the circuit court should have adjourned the May 9, 2013 dispositional hearing after respondent was removed for contempt. Respondent did not request an adjournment and her challenge is unpreserved. Our review is therefore limited to plain error affecting respondent's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Under MCR 3.973(D)(2), "the respondent has the right to be present" at a dispositional hearing. However, this right is not absolute. MCR 3.973(D)(3) permits a court to proceed with a hearing in a party's absence as long as "proper notice has been given." Here, respondent was initially present but was removed by the court. The court warned respondent and gave her a second chance before removing her from the courtroom. The court was within its right to hold respondent in contempt and order her immediately jailed. See MCR 3.928(A); MCL 600.1701(a); MCL 600.1711. In fact, the circuit court showed great restraint in not holding respondent in contempt during numerous court proceedings before May 9. As noted by respondent, the circuit court could have adjourned the hearing to a later date to allow respondent time to calm down and remain present to protect her rights. However, even a criminal defendant can lose his or her right to be present during trial based on disruptive or disrespectful conduct. See *Illinois v Allen*, 397 US 337, 343; 90 S Ct 1057; 25 L Ed 2d 353 (1970).

Respondent continues that the deprivation of her rights was compounded because her attorney filed a motion to withdraw before the hearing but the court indicated that it would not consider the motion until the hearing's conclusion. It appears from respondent's statements on the record that she had retained alternate representation. After respondent was removed from the courtroom, her sole advocate was an attorney with whom she had had a falling out. There is no record indication that respondent asked replacement counsel to be present at the May 9, 2013 hearing. And there was no guarantee that the court would have adjourned the hearing to a later date so respondent could have proceeded with counsel of her choosing. Regardless of whether respondent was pleased with the attorney-client relationship, she was actually represented at the hearing.

At the conclusion of the May 9, 2013 hearing, the circuit court suspended respondent's parenting time until respondent secured mental health treatment and complied with and benefited from a medication regimen. The court indicated that it needed to see reports from the healthcare providers as evidence of her compliance and progress. The court further noted "I'm not prejudging anything. But . . . I am not at all optimistic that [respondent] is able to or will comply with the Parent Agency Agreement." Therefore, the court opined, "I expect that in very short order this petition is going to be amended to be requesting termination of parental rights."

Despite the court's comments, there is no record indication that the DHS has pursued termination of respondent's parental rights. Moreover, it is unlikely that the outcome of the

hearing would have been different had respondent been in attendance. Accordingly, we discern no prejudice warranting relief.

#### IV. EX PARTE COMMUNICATION

Respondent also argues that the circuit court erred by having an impermissible ex parte communication with her older children prior to the dispositional hearing. MK and DK appeared at the courthouse on the day of the hearing. They informed their guardian ad litem that they did not want to attend and preferred to return to school. The circuit court judge went into the hallway and confirmed that the children wished to go to school. The judge then excused their presence. Respondent vociferously objected to the court's communication and implied that the children were convinced not to stay for the hearing.

Pursuant to MCR 3.973(D)(1), a court may excuse a subject child from attending a dispositional hearing "as the interests of the child require." The court rule does not permit the court to make this decision following an ex parte communication, however. Code of Judicial Conduct, Canon 3(A)(4) provides that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." An interview with a subject child in a child protective proceeding without the presence of the parties and attorneys is an ex parte communication. *In re HRC*, 286 Mich App 444, 451; 781 NW2d 105 (2009). As a matter of practice under the Child Custody Act, MCL 722.21 *et seq*, a court may conduct an ex parte interview with a child but only to determine the child's personal preference in relation to the court's best interests determination. *HRC*, 286 Mich App at 451. The ex parte communication in this case was clearly improper.<sup>2</sup>

Again, respondent has established no prejudice as a result of the judge's improper communication. Respondent has not posited that the children would have been called to testify. She also has not established what testimony the children may have given. Accordingly, it is pure speculation that the children's presence would have impacted the hearing outcome.

#### V. ASSISTANCE OF COUNSEL

Finally, we reject respondent's argument that she was not provided the effective assistance of counsel.

An indigent parent involved in a hearing which may terminate his or her parental rights is entitled to appointed counsel. The right to counsel includes the right to competent counsel. In analyzing claims of ineffective assistance of counsel at termination hearings, this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law

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<sup>2</sup> Respondent notes the irony that her outrage over this improper communication resulted in the court jailing her for contempt. Disagreement with a judge's legal rulings is no excuse to disrupt the court, however.

context. [*In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988) (citations omitted).]<sup>3</sup>

A respondent's claim of ineffective assistance includes two components: "First, the [respondent] must show that counsel's performance was deficient. . . . Second, the [respondent] must show that the deficient performance prejudiced the defense." *Strickland v Washington*, 466 U.S. 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish the deficiency prong, a respondent must show that counsel's performance fell below "an objective standard of reasonableness" under "prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect, the respondent must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663-664.

Respondent first complains of counsel's failure to call Dr. Wayne Simmons at the interim placement hearing. Dr. Simmons was appointed by the court to conduct individual psychological evaluations of respondent and her children. Petitioner originally indicated its intent to call Dr. Simmons at the placement hearing, but changed its mind two days before the hearing. Respondent's attorney, despite being given immediate notice, took no action to secure Dr. Simmons' presence.

Even if the failure to secure Dr. Simmons' presence amounted to an error, respondent could establish no prejudice warranting relief. Dr. Simmons did testify at the May 9, 2013 dispositional hearing and his testimony was not flattering. Dr. Simmons described respondent as "delusional" and "paranoid and suspicious about almost everybody." Dr. Simmons noted that respondent's personality was "contentious, inflammatory, and provocative, and obstinate." He continued, "I don't know what will help this poor lady settle down. She's about as inflamed as I've ever seen anybody. And certainly as inflamed as I've ever seen anybody outside of a hospital." Dr. Simmons specifically testified that the court should not return the children to respondent's care until she remedied her "paranoid stance, negativity, and aggressiveness" because it rendered her incapable of controlling and caring for her children. The psychologist also testified that he did not believe that it was possible for respondent to establish a therapeutic relationship with any treatment provider, and that he was "dramatically pessimistic" about respondent's ability to reorganize herself and resume custody of her children. The court relied on this evidence in terminating respondent's supervised visits with the children. It is inconceivable that the court would have retained the children in respondent's care with the addition of this evidence at an earlier hearing.

Respondent asserts that counsel was ineffective in agreeing to represent respondent at the May 9, 2013 hearing after stating in his motion to withdraw that his "apprehensi[on] that [his] continued representation of [respondent] [would] be unduly prejudicial to [him] personally and professionally." As proof that counsel's representation was less than zealous, respondent notes that her attorney elicited testimony that she refused to sign authorizations for the release of

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<sup>3</sup> The DHS has not sought termination of respondent's parental rights. Yet, termination is a possibility in any child protective proceeding, making the attorney competence standard relevant.

medical records. Respondent also challenges counsel's statement to the court: "And I am saying this as an officer of the Court. I told [respondent] to sign every [received treatment authorization]. I think for me to say anything further would just dig [respondent's] hole deeper."

While counsel's comment implicitly recognizes that his actions were not beneficial to respondent, neither this comment nor the testimony elicited was a shock to the court. Respondent's refusal to authorize the release of her medical information and to sign case service plans was a recurring theme in these proceedings. As such, we discern no prejudice to respondent in this regard.

Respondent further argues that counsel should have objected to the circuit court's ex parte communication with her children. Respondent makes no attempt to show that an objection would have altered the judge's ultimate decision to excuse the children's presence at the hearing. Absent any showing of prejudice, respondent has failed to establish entitlement to relief.

We affirm.

/s/ Donald S. Owens  
/s/ Stephen L. Borrello  
/s/ Elizabeth L. Gleicher