

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

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In the Matter of GENERAL SMITH, DWAYNA  
LEWIS, a/k/a DWAYNA SMITH, SRECIIOUS  
SMITH, a/k/a PRECIOUS SMITH and INDNESIA  
SMITH, Minors.

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DEPARTMENT OF SOCIAL SERVICES,

Plaintiff- Appellee,

v

ALLEN SMITH,

Respondent- Appellant,

and

JEANNIE GOODE,

Respondent.

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UNPUBLISHED

August 20, 1996

No. 174627

LC No. 93-057251

Before: Markey, P.J., and McDonald and M.J. Talbot,\*JJ.

PER CURIAM.

Respondent Allen Smith appeals as of right from a probate court order terminating his parental rights to General Smith (d/o/b 5/30/88), Srecious Smith a/k/a Precious Smith (d/o/b 2/14/91), Dwayna Lewis, a/k/a Dwayna Smith (d/o/b 6/3/92), and Indnesia Smith (d/o/b 7/13/93).<sup>1</sup> The probate court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(i) and (ii), and (3)(g); MSA 27.3198(598.19b)(3)(b)(i) and (ii), and (3)(g) [parent's act caused physical injury or physical or sexual abuse and there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable

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\* Circuit judge, sitting on the Court of Appeals by assignment.

future if placed in the parent's home, parent had an opportunity to prevent injury or abuse but failed to do so, and neglect, respectively]. We affirm.

Respondent first asserts that the trial court was without jurisdiction to litigate the termination petition with respect to him because the evidence never established that he was the "legal" father of Jeannie Goode's four youngest children and because the prosecutor argued an improper theory of termination, i.e., how a parent treats one child is probative of how the parent will treat other children. We disagree. Jeannie Goode, the children's mother, testified that respondent was their biological father, and respondent never denied these allegations. Indeed, we find respondent's assertions to be illogical at best. It appears that respondent is alleging error in the fact that he was *included* or *allowed to participate* in the termination proceedings, despite the testimony regarding his biological relationship to Goode's four youngest children. Respondent did not testify to the contrary or deny paternity, thereby permitting the probate court to conclude by implication that respondent acknowledged paternity over these children. We find no support for respondent's assertion of error on this basis. We also find that the prosecutor's comments were not inappropriate. *In re Powers*, 208 Mich App 582, 588; 528 NW2d 799 (1995).

Because respondent never directly appealed the probate court's exercise of jurisdiction nor requested rehearing of the court's decision to take jurisdiction in the case, we may not review this issue on appeal. Cf. *In re Bechard*, 211 Mich App 155, 159-160; 535 NW2d 220 (1995); *In re Powers*, *supra* at 587-588. Even if respondent lacks standing to participate in the probate court as a parent, he has failed to demonstrate any legal basis for disturbing the probate court's exercise of jurisdiction over the children at the adjudicative or dispositional phases of the proceedings. Cf. *Altman v Nelson*, 197 Mich App 467, 477-479; 495 NW2d 826 (1992). Indeed, the probate court gave respondent greater rights than he was entitled to under the court rules by allowing him to participate in the termination proceedings in the same manner as a legally recognized father despite respondent's failure to establish paternity as provided for in MCR 5.903(A)(4). Because any error in standing favors respondent, it provides no basis for vacating the termination order. MCR 5.902(A); MCR 2.613(A). Respondent is therefore not entitled to relief on this issue.

Respondent next argues that the probate court erred in determining on remand that he was denied effective assistance of counsel.<sup>2</sup> We disagree. When analyzing claims of ineffective assistance of counsel in termination proceedings, this Court has applied by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law arena. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). In the case at bar, respondent failed to show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced him as to deprive him of a fair trial at the adjudicative or dispositional states of the proceedings. See *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). First, because there was no actual conflict of interest between respondent's and Goode's positions at trial, counsel did not err by failing to advise respondent of problems inherent in joint representation. Also, because respondent and Goode did not have adverse interests at trial, respondent would not have been entitled to additional peremptory challenges even if these two parties had separate attorneys. MCR 5.911(C)(3). We agree with the probate court's determination that counsel did not err in failing to

request separate trials and that no error occurred as a result of conducting one proceeding involving all eight of Goode's children. We further find that MCR 6.005, regarding joint representation in criminal proceedings, does not apply to child protection proceedings because it is not specifically referenced in subchapter 5.900 of the Michigan Court Rules. MCR 5.901(A). We find no actual conflict requiring counsel to withdraw his representation of respondent. Also, although respondent allegedly gave his attorney a note during the adjudicative phase that said "you're fired" and the attorney failed to bring this matter to the court's attention, contrary to MRCP 1.16(a)(3), we hold that respondent has failed to establish that his withdrawal request would have been successful. Absent a showing that the court would have granted the withdrawal request, respondent cannot show prejudice. See, e.g., *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1996). Finally, we believe that respondent's remaining challenges to counsel's alleged breach of duty of loyalty address decisions involving trial strategy and, therefore, provide no basis for an ineffective assistance claim. *Pickens, supra* at 325, 330, citing *People v Lundberg*, 364 Mich 596, 600-601; 111 NW2d 809 (1961).

Third, respondent alleges that the probate court erred by failing to permit the presentation of evidence regarding the statutory grounds for termination at the adjudication phase of trial.<sup>3</sup> We disagree. Our review of the record reveals that the probate court did not prohibit any party from introducing evidence on the allegations in the petition or the statutory grounds for termination. Rather, the court was concerned that the jury not be advised that the Department of Social Services was seeking to terminate parental rights and that the jury understand that the court, not the jury, would decide if statutory grounds existed for termination. See, generally, *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993).

Fourth, we find that respondent failed to preserve for appeal the issue whether the prosecuting attorney vouched for the witnesses' credibility, and we find no exceptional circumstances compelling appellate review, particularly in light of the court's instructions that the arguments of counsel were not evidence. See *People v Bahoda*, 448 Mich 261, 276-277, 281; 531 NW2d 659 (1995); *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1995).

Finally, respondent argues that the probate court erred in failing to permit counsel or an investigator an opportunity to question the children before trial, per MCR 5.922(A)(2).<sup>4</sup> We find no abuse of discretion. See *In re Lemmer*, 191 Mich App 253, 254-256; 477 NW2d 503 (1991). Although the court denied respondent's counsel's request, the court did authorize respondent to receive any discovery information that DSS possessed, including investigator's notes or statements taken from the children. Additionally, the four older children testified at trial and were available for cross-examination. Respondent's counsel also had an opportunity to question one of those children at respondent's preliminary examination regarding sexual abuse charges. Thus, even assuming that the court abused its discretion in disallowing the interviews, this error was harmless. MCR 2.613(A); MCR 5.902(A).

Affirmed.

/s/ Jane E. Markey  
/s/ Gary R. McDonald  
/s/ Michael J. Talbot

<sup>1</sup> The children's mother, respondent Jeannie Goode, filed a separate appeal regarding the termination of her parental rights in Docket No. 175247, but this appeal has been dismissed.

<sup>2</sup> This case was consolidated on appeal with Jeannie Goode's appeal and remanded by order of this Court to the probate court so respondent and Good could pursue claims of ineffective assistance of counsel. On remand, respondent, Goode, their attorney, and others testified at a *Ginther* hearing. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). The probate court granted a new "best interests" hearing for Goode because she alone was prejudiced by her counsel's deficient performance, but respondent was denied this relief because no prejudice was shown.

<sup>3</sup> Notably, respondent does not address the merits of the probate court's findings of fact that the statutory grounds for termination were established under MCL 712A.19b(3)(b)(i), (ii), and (3)(g); MSA 27.3198(598.19b)(3)(b)(i), (ii), and (3)(g).

<sup>4</sup> MCR 5.922(A)(2), as amended, provides: "On motion of a party, the court may permit discovery of any other materials and evidence, including untimely requested materials and evidence that would have been discoverable of right under subrule (A)(1) if timely requested. Absent manifest injustice, no motion for discovery will be granted unless the moving party has requested and has not been provided the materials or evidence sought through an order of discovery."