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2019 IL App (3d) 190255-U

Order filed September 26, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

In re Jo.W. and Ja.W.,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Minors	)	Whiteside County, Illinois.
	)	
(The People of the State of Illinois,	)	
	)	Appeal Nos. 3-19-0255 and
Petitioner-Appellee,	)	3-19-0256
	)	Circuit Nos. 15-JA-26 and
v.	)	15-JA-27
	)	
Lindsey H.,	)	
	)	The Honorable
Respondent-Appellant).	)	Patricia Ann Senneff,
	)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Schmidt and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held*: While the respondent-mother's initial counsel did not render ineffective assistance of counsel, her second attorney labored under a *per se* conflict of interest such that the circuit court's unfitness and best interest rulings must be reversed and the case remanded for further proceedings on the termination petitions. Further, due to the judge's prior representation of the State in the case, on remand the court is directed to ensure compliance with Supreme Court Rule 63.

¶ 2 The circuit court entered orders finding the respondent-mother, Lindsey H., to be an unfit parent and terminating her parental rights to the minors, Jo.W. and Ja.W. On appeal, the respondent argues that: (1) her first attorney was ineffective; (2) her second attorney labored under a *per se* conflict of interest; (3) the court labored under a *per se* conflict of interest; (4) the court erred when it found her to be an unfit parent; and (5) the court erred when it found it was in the minors' best interest to terminate her parental rights. We reverse and remand.

¶ 3 FACTS

¶ 4 Eight months after a hotline report was received that Jo.W. (born December 29, 2012) and Ja.W. (born March 27, 2014) had been inadequately supervised, on July 13, 2015, the respondent called the Department of Children and Family Services (DCFS) and stated she lacked the emotional and financial stability to care for the minors. The minors were taken into protective custody and were placed with Sara and Bruce Colmark.

¶ 5 The following day, petitions for adjudication of wardship were filed, which alleged that the minors were neglected in that they "[do] not receive the proper or necessary support, education as required by law, or medical or other remedial care recognized under State law as necessary for a minor's well-being, or other care necessary for the minor's well-being, including adequate food, clothing and shelter." At the first appearance on temporary custody, the respondent appeared *pro se* and was admonished by the circuit court, *inter alia*, on the consequences of the filing of juvenile petitions. After the respondent waived her right to a temporary custody hearing, the court appointed attorney Dan Huffman to represent her. Then, the respondent asked the court, "Could I say where I want my kids? Could they stay with Sarah and Bruce? That's who I want them to be with." The court stated that it could not tell DCFS where to place a child, but "if that's where they were previously and that's where they're at

today, there is a good chance they will continue to remain there." The court also admonished her that "you must cooperate with [DCFS]. Comply with the terms of the service plans and correct the conditions that require your children to be in care or if the Court at a later time declares your child a ward of the court, you could risk termination of your parental rights."

¶ 6 Assistant State's Attorney Carol Linkowski was assigned the case for the State. At one pretrial hearing, on October 27, 2015, the Whiteside County State's Attorney, Trish Joyce, appeared on behalf of the State in Linkowski's stead. The only matter addressed at the hearing was whether the parents had complied with paternity testing that had been previously ordered. The Lutheran Social Services (LSS) employee informed the court that the testing had been done, but the results were not back yet. Joyce did not speak at the hearing. The case was then continued for another pretrial conference.

¶ 7 On January 5, 2016, the respondent stipulated that the minors were neglected as alleged in the petition. Accordingly, the court entered orders finding the minors to be neglected and setting the cases for a dispositional hearing.

¶ 8 Attorney Colleen Buckwalter was assigned the minors' guardian *ad litem* at the outset of the case. At the dispositional hearing in early 2016, however, attorney Mark Holldorf appeared in Buckwalter's stead. The LSS dispositional hearing report and integrated assessment were entered into evidence, and no other evidence was presented. When the court asked the State for a recommendation, Linkowski requested that the minors be made wards of the court and that the court order the respondent to complete the tasks recommended by LSS. When asked for the guardian *ad litem*'s recommendation, Holldorf stated, "I agree with that." Holldorf made no other comments during the hearing.

¶ 9 At the close of the hearing, the circuit court made the minors wards of the court, found the respondent to be an unfit parent, and granted guardianship to DCFS with the right to place. The court also ordered the respondent to complete the following tasks: (1) attend, participate in, and complete mental health counseling and follow all recommendations; (2) attend, participate in, and complete a substance abuse evaluation and follow all recommendations; (3) complete random drug drops as required by DCFS or its assigns; (4) attend, participate in, and complete a parenting education class and follow all recommendations; (5) attend, participate in, and complete a domestic violence class and follow all recommendations; (6) complete a psychological evaluation and follow all recommendations; (7) take all psychotropic medication as prescribed to her; (8) maintain employment; (9) notify DCFS and its assigns of any changes in personal information, including change of addresses, employment, and changes to persons living in her home; (10) sign all releases of information requested by DCFS and its assigns; and (11) follow any recommendations contained in the integrated assessment complied by DCFS.

¶ 10 Several permanency review hearings were held over the next two years. During that time, the case was transferred to Judge Trish Senneff. Senneff was formerly known as Trish Joyce and, as previously mentioned, was the Whiteside County State's Attorney and had appeared once in this case in Linkowski's stead on behalf of the State.

¶ 11 Service plans and court reports detailed the respondent's progress toward her tasks during the nine-month period between June 1, 2017, and February 28, 2018. A service plan on which the respondent was evaluated on July 5, 2017, stated the following regarding progress on her tasks. She failed to obtain a psychological evaluation, was not in counseling since June 2016, and had not followed up with medication management. She failed to complete domestic violence education, as she had only attended two classes, the last one being in May 2017. She

failed to complete parenting education and did not make satisfactory progress on demonstrating adequate parenting skills. She made satisfactory progress on attending visits with the minors. She made satisfactory progress on signing releases of information and updating her personal information with LSS, but failed to consistently engage in services. She failed to complete a substance abuse evaluation and had not been honest about her substance abuse issues. She had been in the emergency room on June 1, 2017, and had cocaine and THC in her system, and she failed to show for a drug drop on the next day.

¶ 12 A court report compiled by LSS on August 14, 2017, stated that the respondent had been living with friends and extended relatives since she had been asked to leave her parents' home in August 2016. She had not maintained stable employment and was currently unemployed. She had been previously diagnosed with Bipolar Disorder and self-medicated with marijuana, and she missed another drug drop on July 6, 2017. She completed a psychological evaluation on July 11, 2017, which recommended that she complete a neuropsychological evaluation due to her having symptoms consistent with a developmental disorder.

¶ 13 A service plan on which the respondent was evaluated on January 14, 2018, stated the following regarding progress on her tasks. While she reported engaging in counseling services with the Whiteside County Health Department, the caseworker had not heard back regarding a treatment plan. She failed to attend a follow-up appointment to review the results of her psychological evaluation, and she refused to obtain the neuropsychological evaluation. She had attended all visits with the minors (once per month for one hour), but had failed to demonstrate adequate parenting skills. While she reported participating in parenting education at the Young Women's Christian Association (YWCA), the caseworker had not been able to obtain a report on it. She made satisfactory progress on signing releases of information and updating her personal

information with LSS, but failed to consistently engage in services. She completed domestic violence classes in August 2017 and reported that she was in a relationship that was free of domestic violence. She failed to attend all five drug drops (July 6, August 25, October 4 and 20, and December 21, 2017) and was not involved in substance abuse treatment.

¶ 14 A court report compiled by LSS on March 8, 2018, stated that the respondent was living in an apartment in Sterling, Illinois. She had not maintained stable employment, although she was employed at McDonalds at the time of the report. She had revoked a release of information regarding counseling at the Whiteside County Health Department and would only allow it to disclose that she had been in for appointments on certain dates. She also had not signed a release of information regarding parenting education through the YWCA. She missed drug drops on January 22 and February 9, 2018.

¶ 15 The respondent's failure to make satisfactory progress on her tasks ultimately culminated in the State filing petitions to terminate her parental rights to the minors on March 26, 2018. The petitions alleged that the respondent had failed: (1) to maintain a reasonable degree of interest, concern, or responsibility as to the welfare of the minors; (2) to make reasonable progress toward the return of the minors to her care during the nine-month period from June 1, 2017, to February 28, 2018; and (3) to make reasonable efforts during that nine-month period to correct the conditions that led to the minors' removal from her care.

¶ 16 During the pendency of the petitions, on August 7, 2018, Holldorf appeared as permanent replacement counsel for the respondent. As previously noted, Holldorf had appeared earlier in this case at one hearing in the guardian *ad litem*'s stead.

¶ 17 The circuit court held a hearing on the respondent's fitness on December 4, 2018. LSS caseworker Joy Hutchinson testified in accord with the service plan evaluations and court reports

she had prepared regarding the relevant nine-month period. Of note, Hutchinson stated that she did not have any information on whether the respondent completed an assessment for counseling, as the respondent had revoked her consent for the counselor to release information to LSS. The respondent had been living with her parents during the relevant nine-month period. Hutchinson reiterated that the respondent had attended all visits with the minors, and she further stated that the respondent's behavior and interaction with the minors during those visits was appropriate.

¶ 18 Holldorf called the respondent to testify at the hearing. She stated that she had three classes left to finish parenting education. She was one test away from obtaining her General Educational Development certification. She had quit her job at McDonalds because she was supposed to move to Rockford, but that move never happened. She had been applying for other food-related jobs. The respondent claimed that she had never revoked any releases and that she was hearing about this alleged revocation for the first time at the hearing. She stated she had met with an LSS employee who told her she was not in compliance with the order to sign releases. The respondent then stated:

> "I said I signed the release forms and she said, no, we need to know what you're discussing with your counselor and because you're not letting us know that, you're not being compliant and I said I'm being – I said I didn't think I had to tell you what we talked about privately. I thought I was only supposed to let you guys know that I was attending and what medications I would be put on and stuff like that. *** But I never revoked anything. I've let them know everything I've done and am doing. Not once have I revoked anything."

¶ 19 The respondent also testified that she believed the neuropsychological evaluation was not required because Hutchinson told her it was optional:

> "I was told that it was not a requirement, it wasn't forced. I was told that I had the option of whether or not I wanted to go, because I have been through three mental health evaluations prior to that and I felt like at the time they were just looking for something to say was wrong with me. So I was like I'm not going to go give you guys another reason to throw at me at court. So I said I completed three mental health evaluations, that's good enough for you people and it should have been, so that's why I didn't do the neurology thing. I was told that it was an option, not a requirement."

¶ 20 On cross-examination, the respondent claimed that she never got any of the court orders in this case, including from Huffman, her first attorney.

¶ 21 At the close of the hearing, the court found that the State had proven by clear and convincing evidence that the respondent failed to make reasonable progress and reasonable efforts during the relevant nine-month period. Accordingly, the court found the respondent to be an unfit parent and set the case for a best interest hearing.

¶ 22 The circuit court held a best interest hearing on January 8, 2019. Among the witnesses who testified was Hutchinson. She stated that the minors had been living with the same foster parents since the inception of the case in 2015. The foster mother did not work and was the primary caregiver. The foster parents' extended families engaged in activities with the minors, and the minors were engaged in community activities including church and a bike club.

Hutchinson stated that the minors were well-adjusted to the foster parents' home and that the foster parents met all of the minors' basic needs. They were also willing to adopt the minors.

¶ 23 On cross-examination, Hutchinson stated that the minors had a loving relationship with the respondent. A friend of the respondent, Amanda Carter, and the respondent's mother, Kimberly H., also testified that a strong and loving bond existed between the respondent and the minors.

¶ 24 The respondent also testified regarding the strength of her bond with the minors. She stated that she always tried to teach the minors lessons at visits, including how to express their emotions rather than lashing out physically.

¶ 25 When asked if she was aware that she could try to have the minors placed with a relative, the respondent stated:

> "No, I was not. I was told that they were placed where they were at and that's where it was going to be. I was not aware. It didn't get explained to me.
>
> My attorney, Dan Huffman, nobody ever explained. Dan Huffman told me that adjudication paper was protecting my rights and then when I asked him about; how come they are saying that paper made my kids wards to the State? And he said; you were 25 years old when you signed it and you should have known what it meant, and I didn't. I thought as my attorney he should have explained."

¶ 26 At the close of the hearing, the court found that the respondent should be commended for attending every single visit and for loving and caring for the minors so much. However, the

court found that permanency was of overriding importance because the minors had been in their foster placement for years. The court stated, "I don't know how long these children should have to wait until [the respondent] makes whatever changes that she needs to make in her life to have the children in her care." The court further commented that the minors had assimilated into their community, church, and school, and they had a good relationship with the foster parents. The court also noted that the foster parents were providing for the minors' needs and that they wanted to adopt the minors. Thus, the court found it was in the best interest of the minors to terminate the respondent's parental rights.

¶ 27 The respondent appealed.

¶ 28 ANALYSIS

¶ 29 The respondent's first argument on appeal is that her initial attorney—Huffman—rendered ineffective assistance of counsel. Specifically, the respondent contends that Huffman failed to: (1) explain the consequences of stipulating to the adjudication petition; (2) provide her with copies of court orders; and (3) explain that she could have requested the minors to be placed with a relative.

¶ 30 In the context of proceedings under the Juvenile Court Act, ineffective assistance of counsel claims are assessed using the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *In re A.J.*, 323 Ill. App. 3d 607, 611 (2001). To prevail on such a claim, the complaining party must establish that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) but for that deficient performance, the outcome of the proceeding likely would have been different. *Id.* It is unnecessary to address the performance prong if the claim can be decided on the prejudice prong. *Id.*

¶ 31 Our review of the record reveals that there is no merit to the respondent's claims on this issue. Regarding the stipulation, the respondent claims that counsel's failure to advise her of the consequences of the stipulation "resulted in temporary custody of her minor children being given to DCFS." However, it must be noted that temporary custody of the minors had been conceded by the respondent even before Huffman was appointed. She contacted DCFS herself to say that she could not care for the minors, and then she waived the temporary custody hearing. Moreover, at that hearing, the circuit court admonished her of the potential consequences of the proceedings that had started with the filing of the juvenile petitions. While the respondent's claim is at least in part based on her statement at the best interest hearing that she did not understand that signing the stipulation would result in the minors being made wards of the court, we further note that stipulating to the neglect petition is not a guarantee that the minors would be made wards of the court (see 705 ILCS 405/2-22(1) (West 2016)). Under these circumstances, we hold that the respondent cannot show she was prejudiced by any failure of Huffman to explain the consequences of stipulating to the neglect petition.

¶ 32 We also find the respondent's claim that she was not provided with copies of court orders to be disingenuous. The record is replete with references that the respondent had been in contact with LSS over the life of this case and was at least attempting to engage in some services. Even assuming that Huffman did not provide copies of court orders to the respondent and that the failure to do so was deficient performance, the record indicates that between in-court admonishments and her contact with LSS, she was aware of what was required of her. Accordingly, we hold that she cannot show that she was prejudiced by Huffman's alleged failure to provide copies of court orders to her.

¶ 33 Lastly, we also find meritless the respondent's claim that Huffman rendered ineffective assistance by allegedly failing to explain to her that she could request that the minors be placed with a relative. The record indicates that at the initial appearance, before Huffman began representing her, the respondent requested that the minors be placed with "Sarah and Bruce." The record further reflects minors were placed into foster care with Sara and Bruce Colmark. Clearly, the respondent was aware that she could make a request as to where the minor would be placed. As her initial request was honored, it is disingenuous for her to claim now that she was prejudiced by any alleged failure of Huffman to explain to her that she could request the minors be placed with a relative.

¶ 34 For the foregoing reasons, we hold that the respondent cannot show that she was prejudiced by any of the allegedly deficient performance from Huffman. Accordingly, we hold that Huffman did not render ineffective assistance of counsel.

¶ 35 The respondent's second argument on appeal is that her second attorney—Holldorf—labored under a *per se* conflict of interest because he appeared in the guardian *ad litem*'s stead at a hearing in this case prior to his representation of the respondent.

> "A *per se* conflict arises when a defense attorney has ties to a person or entity that would benefit from an unfavorable verdict for the defendant, because the attorney's knowledge that his or her *other* client's favorable result would conflict with the defendant's interest 'might subliminally' affect counsel's performance in ways [that are] difficult to detect and demonstrate." *In re Darius G.*, 406 Ill. App. 3d 727, 732 (2010) (quoting *People v. Hernandez*, 231 Ill. 2d 134, 142-43 (2008)).

We review whether an attorney labored under a *per se* conflict of interest *de novo*. *Id.*

¶ 36 An important aspect of the *Darius G.* decision appears in a footnote. In that case, which involved the termination of parental rights, numerous attorneys appeared on behalf of the parties over the life of the case. *Id.* at 729-31. One attorney appeared on behalf of the respondent-mother for the arraignment on the termination petition. *Id.* at 730. That attorney later appeared at a pretrial conference representing the minor, and the record reflected no explanation for the change in representation for the minor. *Id.* Those were the only two appearances made by that attorney. *Id.* Despite the brief nature of the representations, the *Darius G.* court noted that the attorney "appeared *on behalf of* his clients." (Emphasis in original.) *Id.* at 738 n. 4. The distinction between appearing on behalf of clients and merely assisting colleagues who could not be present was emphasized: "[The conflicted attorney] did not, for example, represent to the court that respondent's [or the minor's] counsel was unavailable and that a continuance was needed. The distinction is critical because, in the latter example, [the conflicted attorney] would be representing his office or his colleague, not a client. Accordingly, there would be no conflict." *Id.*

¶ 37 In this case, Holldorf appeared in the guardian *ad litem*'s stead at the dispositional hearing, where he stated that he agreed with the State's recommendations. This was not a situation in which he appeared on behalf of the guardian *ad litem* and asked for a continuance. See *id.* Later, after the termination petitions were filed, Holldorf appeared on behalf of the respondent as a permanent replacement for Huffman. Thus, in the same case, Holldorf first advocated for the respondent to be found dispositionally unfit[1] and later appeared on behalf of

[1] While the State (and via his agreement, Huffman) did not expressly argue that the respondent was unfit, they did argue that the minors should be placed under the guardianship of DCFS. That placement necessarily required a finding that the respondent was unfit. See 705 ILCS 405/2-23(1), 2-27(1) (West 2016);

the respondent on the termination petitions and argued that she should not be found unfit and that it was not in the best interest of the minors to terminate her parental rights. These are opposing positions that we believe created a *per se* conflict. See *id.* at 738-39; *In re Quadaysha C.*, 409 Ill. App. 3d 1020, 1021-25 (2011); see also *In re S.G.*, 347 Ill. App. 3d 476, 480-82 (2004). In such circumstances, prejudice is presumed and the respondent is entitled to a reversal of the orders finding her to be an unfit parent and terminating her parental rights to the minors. *Darius G.*, 406 Ill. App. 3d at 739; *Quadaysha C.*, 409 Ill. App. 3d at 1025. We remand the case for further proceedings on the termination petitions and for appointment of new counsel for the respondent. *Darius G.*, 406 Ill. App. 3d at 739.

¶ 38 Lastly, because we have ruled that a remand for further proceedings is necessary, we must address the merits of the respondent's third argument on appeal—namely, that Judge Senneff had a conflict of interest and therefore should have recused herself.

¶ 39 In relevant part, Supreme Court Rule 63(C)(1)(b) provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where *** the judge served as a lawyer in the matter in controversy[.]" Ill. S. Ct. R. 63(C)(1)(b) (eff. July 1, 2013).

¶ 40 Initially, we note that the State suggests that the respondent has forfeited this issue because it was not raised in the circuit court. We disagree. Rule 63(C) *requires* a judge to disqualify herself in certain situations; waiver or forfeiture in situations in which the complaining party "did not know the reason for disqualification or have a reason to know" would defeat the purpose of the rule to promote confidence in the impartiality of judges. *FDIC v. O'Malley*, 163 Ill. 2d 130, 140 (1994); see also *SCA Services, Inc. v. Morgan*, 557 F. 2d 110, 117 (7th Cir. 1977) (construing the federal equivalent of Illinois Supreme Court Rule 63).

¶ 41 Generally, disqualification is not necessary if the judge's prior involvement was merely supervisory in nature. See *In re Detention of Hargett*, 338 Ill. App. 3d 669, 674 (2003). Here, while the record clearly reflects that Assistant State's Attorney Linkowski was the primary attorney working on the case from the State's Attorney's office, Judge Senneff's role was not merely supervisory in nature. She appeared on behalf of the State at a pretrial hearing. She did not speak at the hearing, but she did not appear merely to state that Linkowski was unavailable and that a continuance was required. Under these circumstances, we hold that Judge Senneff's impartiality could reasonably be questioned when she took over as the judge presiding over the case after the dispositional hearing. If she did not recuse herself from the case (see *Hargett*, 338 Ill. App. 3d at 674), at a minimum the conflict should have been disclosed and the procedure for remittal of disqualification followed that appears in section D of Rule 63 (Ill. S. Ct. R. 63(D) (eff. July 1, 2013)). Accordingly, on remand, we direct the circuit court to ensure compliance with Rule 63.

¶ 42 Our rulings on these issues obviate the need to address the respondent's unfitness and best interest arguments.

¶ 43 CONCLUSION

¶ 44 The judgment of the circuit court of Whiteside County is reversed and the cause is remanded for further proceedings.

¶ 45 Reversed and remanded.