2023 IL App (4th) 221101-U

NOS. 4-22-1101, 4-22-1102, 4-22-1103 cons.

FILED
May 16, 2023
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re Mil. T., a Minor	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Adams County
Petitioner-Appellee,	)	No. 20JA81
v. (No. 2-22-1101)	)	
Ashley T.,	)	
Respondent-Appellant).	)	
_____	)	
	)	
In re E.T., a Minor	)	No. 20JA82
	)	
(The People of the State of Illinois,	)	
Petitioner-Appellee,	)	
v. (No. 2-22-1102)	)	
Ashley T.,	)	
Respondent-Appellant).	)	
_____	)	
	)	
In re Mic. T., a Minor	)	No. 20JA83
	)	
(The People of the State of Illinois,	)	
Petitioner-Appellee,	)	
v. (No. 2-22-1103)	)	Honorable
Ashley T.,	)	John C. Wooleyhan,
Respondent-Appellant).	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice DeArmond and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court granted counsel's motion to withdraw because no meritorious issues could be raised on appeal.

¶ 2 Respondent, Ashley T., is the mother of Mil. T. (born July 2010), E.T. (born December 2013), and Mic. T. (born September 2020). In December 2022, the trial court found respondent was an unfit parent and termination of respondent's parental rights was in the three children's best interests.

¶ 3 Respondent appealed the trial court's judgment terminating her parental rights. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), respondent's counsel on appeal moves to withdraw. See *In re S.M.*, 314 Ill. App. 3d 682, 685-86 (2000) (holding *Anders* applies to termination of parental rights cases and outlining the procedure appellate counsel should follow when seeking to withdraw). In his brief, appellate counsel contends the appeal of this case presents no potentially meritorious issues for review. We agree, grant appellate counsel's motion to withdraw, and affirm the court's judgment.

¶ 4 I. BACKGROUND

¶ 5 This order disposes of three cases the trial court considered together and which we have consolidated on appeal. Each appeal relates to a single child.

¶ 6 A. The Wardship Petitions

¶ 7 On September 22, 2020, the State filed petitions for adjudication of wardship of Mil. T. and E.T., alleging both were neglected minors as defined by the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/1-1 *et seq.* (West 2020)). The State alleged the children's environment was injurious to their health and welfare because: (1) they lived in extremely unsanitary conditions in a hotel room; (2) respondent allowed a registered sex offender, Joseph Lay, to live with her and the siblings; (3) E.T. had disclosed physical and sexual abuse by Lay (4) respondent was engaging in injected drug use in the children's presence; (5) the siblings described seeing physical abuse of respondent by her paramour, Jeffrey Borovay, and

(6) respondent did not have money for housing and could not keep up payment for the hotel room. The trial court conducted a shelter care hearing on September 22, 2020, and placed temporary custody and guardianship of Mil. T. and E.T. with the Illinois Department of Children and Family Services (DCFS).

¶ 8 At the shelter care hearing, Beth A. Wienhoff, a DCFS child protection investigator, testified she had investigated an initial report relating to the unsanitary living conditions and had filed a second report based on her meeting with the two girls. E.T. disclosed apparent sexual abuse by Lay and the use of injected drugs in the girls' presence by Lay, Ashley T., "Aaron" (perhaps Aaron P., E.T.'s father), and "Jeff." Wienhoff also visited the hotel room in which the girls had been living and confirmed its exceptionally bad condition, including the presence of needles on the floor and the lack of any place but the floor for the girls to sleep. Wienhoff testified E.T. also described instances when Borovay hit respondent and E.T. and her sister tried to pull him away. The trial court placed the girls in shelter care with DCFS.

¶ 9 On October 1, 2020, the State filed a petition for the adjudication of wardship of Mic. T., born on September 23, 2020, alleging respondent tested positive for methamphetamines on September 17, 2020, and had received no prenatal care. The trial court placed temporary custody of Mic. T. with DCFS.

¶ 10 An initial service plan for respondent was filed with the trial court on November 5, 2020. The plan required, among other things, respondent participate in the evaluation process, cooperate with service providers, cease use of alcohol and nonprescribed drugs, cooperate with any required drug testing, and participate in weekly visits with the children. (Section 8.2 of the Abused and Neglected Child Reporting Act (325 ILCS 5/8.2 (West 2020) requires the

development of a service plan when a child protective services unit determines credible evidence exists showing a child is abused or neglected.)

¶ 11 B. Respondent's Counsel Raises a Potential Conflict of Interest

¶ 12 At a February 19, 2021, hearing on the State's allegations of neglect, respondent's appointed counsel, John W. Citro, noted he was concurrently representing Borovay in an unrelated matter and suggested he thus might have a conflict of interest in representing respondent. Respondent had received notice of the hearing but was not present. The trial court ruled no *per se* conflict existed and respondent had adequate notice of the hearing. It rejected counsel's request for a continuance and directed him to proceed with his representation.

¶ 13 C. The Finding of Neglect

¶ 14 Wienhoff testified again at the adjudication hearing, providing much the same information as at the shelter care hearing, but adding testing of Mic. T. at birth showed the presence of amphetamines. The trial court found the preponderance of the evidence supported the allegations in the petitions and all three children were neglected minors as defined by the Juvenile Court Act (705 ILCS 405/2-3 (West 2020)).

¶ 15 D. Intermediate Hearings Document Respondent's Arrest and Imprisonment

¶ 16 At a March 26, 2021 hearing, the State represented respondent was refusing all services and had "not remained in regular contact." The trial court suspended respondent's visitation.

¶ 17 At a March 1, 2022, review hearing, the parties noted respondent would be in prison for years, precluding any return of the children to her within the time considered by the plan.

¶ 18 During a June 6, 2022, review hearing, the State noted respondent had received a sentence of 10 years' imprisonment in the Illinois Department of Corrections and her projected

release date was March 2026. While imprisoned, respondent had made use of substance abuse prevention services but otherwise was unable to comply with the permanency plan. The trial court found the other parents also were not progressing towards providing permanent homes for any of the children. The court set a goal of substitute care pending termination.

¶ 19 E. Proceedings for Termination of Parental Rights

¶ 20 On August 22, 2022, the State filed a motion to terminate respondent's parental rights, alleging respondent (1) had failed to make reasonable efforts to correct the conditions which were the basis for the removal of the children and (2) had failed to make reasonable progress toward the return of the minors "within any 9 month time period after an adjudication of neglected minor" and "in any 9 month period after the end of the initial 9 month period following the adjudication of neglected minor." The State gave notice the periods it intended to rely on were February 20, 2021, to November 20, 2021, and November 21, 2021, to August 21, 2022.

¶ 21 A hearing on the termination petition took place on December 20, 2022.

¶ 22 1. *The Question of Unfitness*

¶ 23 a. The Evidence

¶ 24 The State asked the trial court to take judicial notice of the record in the cases, including the order of February 19, 2021, in which the court found the children were neglected, and the dispositional order of March 26, 2021, the date on which the court suspended respondent's visitation. That record included the first service plan. The State also asked the court to take judicial notice of a sentencing order stemming from respondent's conviction of three counts of possession of child pornography, her projected parole date of May 26, 2026, and her projected discharge date of May 26, 2028.

¶ 25 The State called Delaney McDonald, a therapist at the Chaddock organization, who, as a child welfare specialist with the same organization, had been the caseworker for Mil. T. and E.T. McDonald testified respondent had not participated in an "integrated assessment" to develop a service plan. McDonald explained service plans state recommendations for parents' participation in services. In respondent's case, those services were "[s]ubstance abuse, mental health, domestic violence, parenting, cooperation, and housing." Respondent's cooperation was "rated unsatisfactory" because, as of February 2021, she had met with McDonald only once; she repeatedly failed to arrive at scheduled appointments. Further, she was difficult to contact because her phone number was always changing. To McDonald's knowledge, respondent never succeeded in establishing appropriate housing. She never completed a domestic violence assessment, did not complete an approved parenting class, never completed a mental health assessment or acted on a referral for therapy, and never completed a substance abuse assessment. She did not maintain consistent visitation with her children.

¶ 26 Citro objected to McDonald's testimony, asserting respondent's service plan, which the State had not included in the discovery materials, was the best evidence on the matter. The State argued it was "hearsay for the most part except for exceptions." (The first service plan was filed on November 5, 2020, and is part of the common-law record.)

¶ 27 McDonald testified respondent was arrested in May 2021 on multiple child pornography charges and was never released.

¶ 28 Jessica Fuller, a child welfare specialist at Chaddock, testified she created a service plan in March 2022. Respondent had an incarcerated parent plan, which required, primarily, respondent cooperate with Fuller, including by signing any necessary releases, and maintain a meaningful relationship with her children. Once respondent was in prison, services related to

domestic violence and mental health were available to her. Although mental health and domestic violence services were available to her in prison, she participated only in substance abuse related services. Respondent did not send any cards or gifts for Fuller to pass on to the children. She did not sign the releases Fuller asked her to sign.

¶ 29 The State asked the trial court to admit the March 2022 service plan as a business record, which the court did without objection.

¶ 30 Kent D. Dean, counsel for the children, urged the trial court to find her unfit, emphasizing respondent had failed to take advantage of her opportunities to visit the children..

¶ 31 b. The Trial Court's Ruling

¶ 32 The trial court noted the evidence it had considered as follows:

> "The People have introduced into evidence some exhibits today, two of which were service plans, which under the statute, the Court is authorized to examine for purposes of this hearing. However, in resolving these issues, the Court is required to look at all the evidence in the case to determine the fitness of the parents in relation to the needs of the minors and not simply at one particular evaluation that may have been given during part of a service plan."

The court concluded respondent's lack of engagement and her incarceration made her unfit, stating:

> "Both before incarceration and after incarceration, the mother was not engaged in any type of services in any meaningful way which would lead to any type of a return[-]home goal being achieved. There [were] long periods of time prior to incarceration when she was out of contact with the caseworkers and not engaged in any services. Since being incarcerated, she has done some services through the

Department of Corrections but has, because of her own actions of becoming incarcerated, has been unable to discharge any of her parental responsibilities and, thereafter, unable to make any real progress toward any type of a return home goal. So the Court would find that those allegations [of unfitness] regarding the mother have also been proven by clear and convincing evidence."

¶ 33 2. *The Question of the Minors' Best Interests*

¶ 34 a. The Evidence

¶ 35 The State recalled Fuller to testify concerning the children's best interests. She said Mic. T. had the same placement since his discharge from the hospital as a newborn. Mil. T. and E.T. had two placements. At the time of the hearing, they were in a "fictive kin" placement (see 20 ILCS 505/7(b) (West 2020)) and had been there since before December 1, 2021. Fuller believed the girls had bonded with their caregiver, a teacher who reliably brought them to school and appointments. The caregiver was seeking to adopt both girls. Mic. T.'s placement was with his maternal aunt and her husband. Mic. T. was healthy and doing well in daycare. His aunt and her husband had committed to adopting him.

¶ 36 Fuller again testified respondent had not attempted to maintain a relationship with any of the children.

¶ 37 b. The Trial Court's Ruling

¶ 38 The trial court held the children's expected adoption by their caregivers was in their best interests:

"[The children] have been in their respective placements for substantial period[s] of time. The minors appear to be bonded to their foster parents. The homes appear to be safe and appropriate for them. All their needs are being met in the foster

> homes. They are considered preadoptive placements due to the commitment of the foster parents. There has not been any evidence presented to show what relationship, if any, currently exists between any of the minors and any of the natural parents. Also, no evidence presented to show when, if ever, it might be possible to consider placing any of the minors back into the custody of any of the natural parents. It does appear that the best opportunity for the minors to achieve permanency as required by the statute would be through the plans of adoption currently in place through *** the foster parents."

¶ 39 F. Respondent's Appeal and the Motion to Withdraw

¶ 40 Respondent filed notices of appeal in all three cases on December 20, 2022. On December 21, 2022, Saleem Mamdani was appointed to represent her as appellate counsel. On February 27, 2023, appellate counsel filed a motion to withdraw. He has since served a copy of his motion on respondent. More than 21 days have passed, and respondent has not filed a response.

¶ 41 II. ANALYSIS

¶ 42 Appellate counsel argues the appeal of this case presents no potentially meritorious issues for review. He identifies the following as potential issues for review: (1) whether respondent's trial counsel had a conflict of interest preventing him from giving her effective assistance; (2) whether counsel was ineffective for failing to object to the admission of the service plans as business records; and (3) whether the trial court's (a) unfitness and (b) best interests findings were against the manifest weight of the evidence. Appellate counsel has addressed why each of these issues lacks merit in his brief.

¶ 43 We agree with appellate counsel this appeal presents no issues of potential merit. We thus grant appellate counsel's motion to withdraw and affirm the trial court's judgment.

¶ 44 A. It Would Be Frivolous to Argue the Trial Court Erred in Terminating Respondent's Parental Rights

¶ 45 1. *The Bifurcated Termination Standard*

¶ 46 Under the Juvenile Court Act, "the involuntary termination of parental rights involves a two-step process":

> "First, there must be a showing, based on clear and convincing evidence, that the parent is 'unfit,' as that term is defined in section 1(D) of the Adoption Act [citation]. If the court makes a finding of unfitness, the court then considers whether it is in the best interests of the child that parental rights be terminated." *In re C.W.*, 199 Ill. 2d 198, 210 (2002) (citing (750 ILCS 50/1(D) (West 1998)).

¶ 47 2. *Trial Court's Finding of Unfitness*

¶ 48 Appellate counsel argues it would be frivolous to argue the trial court erred in finding respondent unfit. He suggests it would be possible to argue respondent made reasonable *efforts* to correct the conditions that resulted in the children's removal. However, he argues it is proper for an appellate court to affirm the termination of parental rights if it finds any ground of unfitness alleged was adequately proven. He argues it would be frivolous to argue the evidence showing respondent failed to make reasonable *progress* towards the return of the children was insufficient.

¶ 49 a. The Requirements for a Finding of Unfitness Under Section 1(D) of the Adoption Act

¶ 50 We agree it would be frivolous to argue the trial court erred in finding respondent to be unfit. Counsel is correct that "any one ground [for finding unfitness], properly proven, is sufficient to enter a finding of unfitness." *C.W.*, 199 Ill. 2d at 210. Moreover, we agree any

argument the court erred in finding respondent failed to make reasonable progress towards the return of the children would be frivolous.

¶ 51 Section 1(D) of the Adoption Act (750 ILCS 50/1(D) (West 2020)) sets out more than 20 bases on which a court can find a parent to be unfit. The trial court found respondent unfit under both parts of section 1(D)(m) (750 ILCS 50/1(D)(m)(i), (ii) (West 2020)): failure by a parent "(i) to make reasonable efforts to correct the conditions that were the basis for the removal of the child from the parent during any 9-month period following the adjudication of neglected or abused minor"; and failure by a parent "(ii) to make reasonable progress toward the return of the child to the parent during any 9-month period following the adjudication of neglected or abused minor."

¶ 52 A trial court should measure the reasonableness of a parent's progress against what must occur before a child can safely return to the parent. *In re C.N.*, 196 Ill. 2d 181, 213-14 (2001). Although not every form of noncompliance with a service plan is a basis for a finding of unfitness, a parent's compliance with the requirements of the plan is an important part of this measure. *C.N.*, 196 Ill. 2d at 214-15. The *C.N.* court agreed with appellate court decisions which held, "[T]he steps outlined for the parents in the service plan *** should be designed to remedy not only the parental deficiency which was the basis for the child's removal, but other parental deficiencies later identified which would prevent return of the child." *C.N.*, 196 Ill. 2d at 212. "[T]he overall focus in evaluating a parent's progress toward the return of the child [must] remain[ ], at all times, on the fitness of the parent in relation to the needs of the child." *C.N.*, 196 Ill. 2d at 216.

¶ 53 When a trial court has found the existence of clear and convincing evidence of a parent's unfitness, a reviewing court may reverse only if it concludes the finding was against the manifest weight of the evidence. *C.N.*, 196 Ill. 2d at 208.

¶ 54 b. Any Argument the Trial Court Erred in Finding Respondent Unfit Would Be Frivolous

¶ 55 Appellate counsel states he cannot find any potentially meritorious basis to argue the trial court erred in finding respondent had not made reasonable progress towards the return of her children. He noted the reports gave respondent "unsatisfactory" ratings on participation in the service plans for both relevant time periods. Notably, the court suspended her visitation in March 2021 because of her failure to use visitation time. Further, while the juvenile case was pending, she received a sentence of imprisonment on three counts of possession of child pornography. Her projected parole date was then May 2026.

¶ 56 Appellate counsel is correct. To argue the trial court erred in finding respondent unfit would be frivolous. The testimony of McDonald and Fuller established respondent's progress towards the return-home goals of the service plans was nonexistent. Respondent's incarceration made progress difficult, but even before her arrest, she rarely cooperated with caseworkers. Critically, both McDonald and Fuller noted her lack of interest in doing anything to maintain a relationship with her children. In short, not only had respondent failed to make any progress, but she was further from being ready to have the children return to her than when the process started. Thus, it would be frivolous to argue respondent's "progress toward the return of the child[ren]" based on "the fitness of [respondent] in relation to the needs of the child[ren]" (*C.N.*, 196 Ill. 2d at 216) was reasonable. It would therefore be frivolous to argue the court's determination respondent's progress was not reasonable was against the manifest weight of the evidence.

¶ 57 B. The Trial Court's Best Interests Determination

¶ 58 Appellate counsel argues it would be frivolous to argue the trial court erred in determining the termination of respondent's parental rights was in the children's best interests. We agree.

¶ *59* 1. *The Requirements for Finding Termination of Parental Rights Is in a Child's Best Interests*

¶ 60 In *In re J.B.*, 2019 IL App (4th) 190537, we explained both what a trial court must consider in a best interests determination and how we review such a determination:

> "[T]he trial court must consider, within the context of the child's age and developmental needs, the following factors:
>
> > (1) the child's physical safety and welfare; (2) the development of the child's identity; (3) the child's familial, cultural[,] and religious background and ties; (4) the child's sense of attachments, including love, security, familiarity, continuity of affection, and the least disruptive placement alternative; (5) the child's wishes and long-term goals; (6) the child's community ties; (7) the child's need for permanence, including the need for stability and continuity of relationships with parent figures and siblings; (8) the uniqueness of every family and child; (9) the risks related to substitute care; and (10) the preferences of the person available to care for the child. [Citations.]
>
> A reviewing court affords great deference to a trial court's best-interest finding because the trial court is in a superior position to view the witnesses and judge their credibility. [Citation.] An appellate court will not reverse the trial court's best-interest determination unless it was against the manifest weight of the

evidence. [Citation.] A best-interest determination is against the manifest weight of the evidence only if the facts clearly demonstrate that the trial court should have reached the opposite result." (Internal quotation marks omitted.) *J.B.*, 2019 IL App (4th) 190537, ¶¶ 32-33.

¶ 61 2. *Any Argument the Trial Court Erred in Finding Termination of Respondent's Parental Rights was in the Children's Best Interests Would Be Frivolous*

¶ 62 Appellate counsel notes the evidence showed the children had bonded to the caregivers with whom they had been living for much of the pendency of the case. Further, respondent's actions in failing to send gifts to the children or inquire about their well-being suggested indifference. We note Fuller testified the children were doing well in their respective placements.

¶ 63 The evidence supported the trial court's ruling the termination of respondent's parental rights and the children's continued placement with their caregivers was in their best interests. The evidence showed the placements were safe and provided continuity and permanence for the children. The caregivers wanted to adopt the children. It would thus be frivolous to argue the court's determination was against the manifest weight of the evidence.

¶ 64 C. It Would Be Frivolous to Argue
Citro Failed to Provide Effective Assistance

¶ 65 Appellate counsel states he has considered the possibility of arguing Citro was ineffective in failing to object to the admission of the service plans as business records or had a conflict of interest in representing respondent—also a form of ineffective assistance of counsel. On the first point, he argues, because respondent cannot show prejudice from the plans' admission,

it would be frivolous to argue counsel was ineffective. While we do not fully agree with counsel, we do agree any argument based on these claims would be frivolous.

¶ 66 1. *The General Standard for Ineffectiveness in Parental Rights Termination*

¶ 67 The right to counsel in proceedings under the Juvenile Court Act is statutory, not constitutional. 705 ILCS 405/1-5(1) (West 2020). However, our supreme court has held the statutory right to counsel guarantees parents the effective assistance of counsel. *In re Br. M.*, 2021 IL 125969, ¶ 42. The supreme court has thus chosen to use the criminal ineffective-assistance-of-counsel standard of *Strickland v. Washington*, 466 U.S. 668 (1984), as "a helpful structure to guide [the] analysis" of an ineffective assistance claim under the Juvenile Court Act. *Br. M.*, 2021 IL 125969, ¶ 43.

¶ 68 Under the *Strickland* standard, "a [respondent] must show substandard performance by defense counsel and resulting prejudice." *Br. M.*, 2021 IL 125969, ¶ 43. Specifically, a claim of ineffective assistance of counsel in a termination proceeding, must show "that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's unprofessional errors, the result of the proceedings would have been different." *In re C.C.*, 368 Ill. App. 3d 744, 747 (2006). Further, a respondent, "must overcome the strong presumption that counsel's challenged actions were part of a sound trial strategy and not due to incompetence." *C.C.*, 368 Ill. App. 3d at 747-48.

¶ 69 One aspect of the right to effective assistance of counsel is the right to counsel free from a conflict of interest. *Br. M.*, 2021 IL 125969, ¶ 44. We review claims of a conflict of interest by counsel in termination of parental rights proceedings under the same standard as such claims in criminal cases. *Br. M.*, 2021 IL 125969, ¶¶ 42-43.

¶ 70 Illinois law classifies conflicts as either *per se* or actual. *Br. M.*, 2021 IL 125969, ¶ 44. A *per se* conflict exists:

> " '(1) when defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution [citations]; (2) when defense counsel contemporaneously represents a prosecution witness [citations]; and (3) when defense counsel was a former prosecutor who had been personally involved in the prosecution of the [respondent] [citation].' " *Br. M.*, 2021 IL 125969, ¶ 45 (quoting *People Hernandez*, 231 Ill. 2d 134, 143-44 (2008)).

Where a *per se* conflict exists, a party making an ineffective-assistance-of-counsel claim need not demonstrate the prejudice *Strickland* would otherwise require; a court must presume prejudice. *Br. M.*, 2021 IL 125969, ¶ 46. By contrast, "[t]o show an actual conflict of interest, a [respondent] must point to some specific defect in [her] counsel's strategy, tactics, or decision making attributable to [a] conflict." (Internal quotation marks omitted.) *Hernandez*, 231 Ill. 2d at 144.

¶ 71 2. *Any Argument Relating to a Conflict of Interest Would Be Frivolous*

¶ 72 a. *Per Se* Conflict of Interest

¶ 73 Initially, as appellate counsel notes, *Br. M*. overruled a line of appellate cases recognizing other *per se* conflicts in termination of parental rights cases. Those cases would have appeared viable at the time respondent's counsel asked the trial court to address the potential conflict. However, appellate counsel need not address whether respondent's counsel had a *per se* conflict of interest under those standards. A party may not argue the *court* ought to have made an error in his or her favor by following an erroneous case. *Cf. Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993) (holding a party may not argue counsel was ineffective for failing to ask the trial court to follow a later-overruled case).

¶ 74 One might argue Borovay, who respondent's counsel was contemporaneously representing, was a potential witness against respondent concerning her drug use or the condition of the hotel room. However, our supreme court has held contemporaneous representation of a *potential* witness whom the State does not call does not trigger the *per se* conflict rule. *People v. Morales*, 209 Ill. 2d 340, 345-46 (2004). Thus, it would be frivolous to argue Citro had a *per se* conflict of interest.

¶ 75 b. Actual Conflict of Interest

¶ 76 Further, no basis exists to argue counsel's representation of Borovay was an actual conflict of interest.

¶ 77 Appellate counsel argues respondent's counsel forfeited any claim of an actual conflict of interest by failing to raise it in the trial court. Counsel has not persuaded us of this. As a rule, an attorney cannot be expected to argue his or her own ineffectiveness, so a failure to do so does not result in a forfeiture. *People v. Lawton*, 212 Ill. 2d 285, 296 (2004). To argue the existence of an actual conflict, an attorney would have to argue his or her "strategy, tactics, or decision making" were defective in a way attributable to the conflict of interest. (Internal quotation marks omitted.) *Hernandez*, 231 Ill. 2d at 144. This poses the same problem as expecting counsel to make any other kind of argument about his or her own ineffectiveness. *In re D.F.*, 208 Ill. 2d 223, 238-39 (2003), on which appellate counsel relies on the issue of forfeiture, is inapposite, as it does not address the rule counsel is not expected to argue his or her own ineffectiveness.

¶ 78 However, it would nevertheless be frivolous to argue respondent could point to "some specific defect in [her] counsel's strategy, tactics, or decision making attributable to [a] conflict." (Internal quotation marks omitted.) *Hernandez*, 231 Ill. 2d at 144. Because the State chose to rely on respondent's lack of progress and efforts under the plan, we cannot see how any

evidence Citro might have presented or any argument he might have made relating to Borovay would have aided respondent's case. In particular, we cannot see how anything linked to Borovay would dilute the probative effect of the evidence showing respondent failed to make reasonable progress towards the goals in the service plan.

¶ 79 D. Any Argument Citro Was Ineffective for Failing to Object to the Service Plans' Admission Would Be Frivolous

¶ 80 1. *Appellate Counsel's Discussion*

¶ 81 Appellate counsel contends it would be frivolous to argue Citro was ineffective for failing to object to the admission of the service plans:

> "While an argument could potentially be made that the Respondent's counsel's failure to properly object to the admission of the service plans was objectively unreasonable, it is unclear how that could be argued to have resulted in a different outcome in the case."

He also notes the trial court was "clear that while it considered the service plans, its findings were based upon all of the evidence presented, and [as the court stated,] 'not simply at one particular evaluation that may have been given during part of a service plan.' "

¶ 82 2. *How Our Holdings on Hearsay Affect the Plans' Admissibility*

¶ 83 Initially, we note the trial court must be aware of the contents of the service plan. A court could not make proper sense of the repeated testimony relating to whether a parent's progress in compliance with the plan has been satisfactory or unsatisfactory unless it knows the goals set by the plan. Moreover, the *C.N.* court endorsed—with mild caveats—the consideration of a parent's progress towards the plan's goals when a court considers a parent's unfitness under section 1(D)(m) of the Adoption Act. *C.N.*, 196 Ill. 2d at 214-15. Therefore, the court must learn

of the plan goals, either through testimony about them—which would not solve a hearsay problem if the goals were hearsay—or from the plan itself.

¶ 84 But the goals are not assertions and so not hearsay. Illinois Rule of Evidence 801(c) (eff. Oct. 15, 2015) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." We have held utterances (and their written equivalents) which do not contain assertions cannot be hearsay. *People v. Price*, 2021 IL App (4th) 190043, ¶¶ 139-140. Such nonassertions include, among other things, typical questions and commands. *Price*, 2021 IL App (4th) 190043, ¶¶ 139-140. A statement of a goal is like a command in that its purpose is to produce a result, not to assert a fact. The *goals* in the service plan are thus nonhearsay.

¶ 85 3. *It Would Be Frivolous to Argue Admission of the Hearsay Portions of the Plans Prejudiced Respondent*

¶ 86 To be sure, the service plans contain descriptions of the circumstances forming the bases for the goals, and *those* are hearsay regardless of whether they fall under exceptions making them admissible. Thus, appellate counsel's discussion applies to the hearsay portions of the plans. It would be frivolous to argue counsel was ineffective for failing to seek to have those portions redacted. The trial court made its unfitness finding based on respondent's failure to make progress towards any of the plan *goals*—her failure to use plan services and her inability to make progress while incarcerated—not any hearsay contained in the plans. Thus, any argument appellate counsel could make that respondent was prejudiced by the admission of the hearsay portions of the plans would be frivolous. Any argument appellate counsel could make that Citro was ineffective for failing to object to the court's admission of the hearsay portions of the plans would therefore also be frivolous.

¶ 87 III. CONCLUSION

¶ 88 For the reasons stated, we agree with appellate counsel no meritorious issues exist to raise on appeal. We therefore grant counsel's motion to withdraw and affirm the trial court's judgment.

¶ 89 Affirmed.