

STATE OF MICHIGAN

COURT OF APPEALS

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In the Matter of ALEXANDER PERRI, JOSHUA  
WILLER and NICHOLAS MARCICKY, Minors.

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JENNIFER CRAVEN,

Respondent-Appellant.

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UNPUBLISHED

May 8, 2008

No. 280156

Menominee Circuit Court

Family Division

LC No. 05-000181-NA

Before: O'Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Respondent-appellant, the mother of the involved minor children, appeals as of right a circuit court order terminating her parental rights pursuant to MCL 712A.19b(3)(c)(i) [the conditions leading to the adjudication continue to exist with no reasonable likelihood of rectification within a reasonable time given the children's ages], and (c)(ii) [the parent received recommendations to rectify other conditions and had a reasonable opportunity to do so, but failed to rectify the other conditions]. We affirm, and decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Facts and Proceedings

Respondent is the mother of three minor children, fathered by three different men. On September 8, 2005, Christopher Marcicky, respondent's boyfriend and the father of her youngest child, struck Joshua, one of respondent's other children. Marcicky was arrested, charged with domestic violence, and later placed on probation. A social worker referred respondent and Marcicky to a parent aide, who reported that both failed to cooperate.

In November 2005, a Child Protective Services (CPS) worker observed a bruise behind Alex's ear. The child attributed the injury to respondent. On December 6, 2005, a Wisconsin sheriff's deputy responded to a domestic disturbance complaint at the Tarragon Hotel, where respondent temporarily resided with Marcicky and their child. The deputy discovered that respondent bore evidence of "bruising and bite marks" on "her legs, arms, and neck," and also observed that respondent possessed paraphernalia used to smoke cocaine. Several days later, a

CPS worker visiting respondent's Michigan apartment noted it to be filthy, littered with detritus, and reeking of marijuana. Respondent admitted to the worker that she abused cocaine, marijuana, and Vicodin. On December 9, 2005, petitioner filed a petition seeking circuit court jurisdiction of the children. That day, the court ordered Marcicky to vacate the residence of respondent and the children until further court order.

At a hearing conducted on December 12, 2005, the circuit court appointed counsel for respondent, and sought petitioner's opinion regarding placement of the children. Mary Lou Nast, a Department of Human Services (DHS) worker, recommended that the children remain with respondent, on the condition that she participate fully with Families First in-home services. Respondent agreed, but addressed to the court her belief that Marcicky was "perfectly fine with my children." She objected to Marcicky's court-ordered exile from her apartment, claiming "I don't think that that would be a good idea ta [sic] keep [him] outta the house." The circuit court disagreed, and strongly recommended that Marcicky have no contact with the children.

At a hearing conducted on December 15, 2005, the circuit court authorized the petition after respondent, represented by appointed counsel, admitted to most of its allegations. At a hearing conducted on December 28, 2005, the circuit court assumed jurisdiction over the children, and ordered respondent to participate in services, remain drug free, undergo random drug screens, and maintain a safe and clean home environment. The next day, respondent tested positive for marijuana and cocaine.

On February 9, 2006, petitioner filed a petition to show cause arising from respondent's positive December 2005 drug screen. At a show cause hearing on February 22, 2006, the circuit court noted at the outset the absence of respondent's appointed counsel. The court asked respondent, "Do [you] want to talk to [appointed counsel] before you enter a plea?" Respondent answered, "No, your Honor," and proceeded to plead guilty of having used cocaine and marijuana. At some point during this hearing, which is not specifically noted in the transcript, respondent's appointed counsel entered the courtroom. After ascertaining the knowing and voluntary nature of respondent's plea, the court inquired of her counsel whether any other factual basis for the plea existed, and counsel replied, "No, your Honor." The court then asked whether respondent's counsel had a sentencing recommendation, and he replied that he had "no comment" on that subject. Counsel raised no objection to any aspect of respondent's guilty plea. The court sentenced respondent to a 30-day jail term, with 5 days to be served immediately and 25 days held in abeyance pending compliance with services.

Petitioner filed a second show cause petition on March 21, 2006, alleging that respondent allowed Marcicky into her home, and that he had thrown one of the children under a bed. The petition additionally averred that respondent had been evicted from her apartment due to nonpayment of rent "and also due to the damages in the apartment incurred during domestic disputes with Mr. Marcicky." On March 23, 2006, the circuit court ordered the removal of the children from respondent's custody, and at the subsequent hearing observed, "There has not been compliance and in fact there has been defiance . . . . Mr. Marcicky it appears continues to be a bandit in and out of the family causing disturbance, reeking [sic] havoc, and having no benefit to the family whatsoever." On March 29, 2006, respondent pleaded not guilty to the second petition to show cause, and the court scheduled a trial.

Approximately a week later, the police in Wisconsin arrested respondent and Marcicky during a traffic stop. During this encounter, respondent allegedly obstructed the officer. Petitioner then filed a third show cause petition. At a hearing conducted on June 7, 2006, respondent appeared with substitute, retained counsel, and admitted to both pending petitions. The circuit court sentenced her to two consecutive 30-day jail terms, to be served concurrently with a Wisconsin sentence for credit card fraud.

At a progress review hearing on June 28, 2006, Christine Merecki, a DHS worker, testified that respondent had a “very, very serious addiction” and required inpatient treatment after completing her jail sentence. Merecki opined that respondent could probably be a fit parent if she controlled her drug addiction. After respondent’s release from jail in August 2006, however, she did not enter a drug treatment program. At a progress review hearing on September 27, 2006, Merecki reiterated that respondent “needs to go into rehab.” The court continued the children in their foster care placements.

On November 19, 2006, the police in Michigan arrested respondent and Marcicky after a traffic stop, during which respondent provided a false name. Respondent’s arrest constituted a violation of her Wisconsin probation. Respondent did not attend a show cause hearing conducted on December 20, 2006 because she was incarcerated, and her retained counsel entered a plea of not guilty. Respondent’s counsel attended by telephone the subsequent show cause hearing conducted on February 16, 2007, but respondent remained incarcerated and did not participate. The prosecutor dismissed the petition because the court file did not contain an order specifically prohibiting contact between respondent and Marcicky.

The circuit court conducted a permanency planning hearing on March 14, 2007. Because respondent remained in jail in Wisconsin, she did not participate in the hearing. Respondent’s retained counsel received notice of the hearing, but also did not attend. At the hearing, petitioner recommended the termination of respondent’s parental rights, and the circuit court ordered that a permanent custody petition be filed. Petitioner filed a supplemental permanent custody petition on April 3, 2007. At a pretrial hearing conducted that day, respondent testified by telephone from jail in Wisconsin that she had “fired” her retained attorney and required appointed counsel. The court reappointed respondent’s initial appointed counsel, who had represented her from December 2005 until her retained counsel appeared in June 2006.

The termination hearing commenced on June 7, 2007. Susan Asplund, a foster care worker, testified that although respondent had attended several substance abuse counseling sessions, the counselor felt that “she was dishonest in her reporting to him.” Respondent did not complete a domestic violence counseling program or obtain her GED, and remained in a Wisconsin jail. Respondent’s children had not lived with her since March 2006, when the circuit court removed them from her care due to drug abuse, domestic violence, and a lack of suitable housing. According to Asplund, respondent failed to rectify these conditions at the time of the termination hearing, and Asplund anticipated no substantial changes in respondent’s ability to care for her children within a reasonable time.

Respondent testified that she had attempted to comply with the treatment plan, and had not used controlled substances during her present incarceration. She opined that she had “made much progress mentally and physically,” felt stronger “as a mother,” and that when released she could effectively parent the children. However, respondent could not provide the court with a

definite jail release date, and admitted that when released, she had no prospects for employment or stable housing.

The circuit court terminated respondent's parental rights. In its bench opinion, the court noted that respondent's substance abuse and her abusive living situation brought the children into care, and had continued unabated for 18 months. The court reviewed respondent's history, which involved disregarding court orders, repeated evictions, and her failure to obtain her GED, and observed, "Drugs, and violence, and three different fathers, three different children, evictions, it is not an organized life. It's not conducive to the proper care, rearing and discipline of a child." The circuit court ruled that clear and convincing evidence warranted termination of respondent's parental rights pursuant to MCL 712A.19b(3)(c)(i) and (ii), and that termination would not contravene the children's best interests.

Respondent now appeals as of right.

## II. Issues Presented and Analysis

Respondent first contends that the circuit court violated her Sixth Amendment and Due Process rights to counsel when it conducted two hearings in the absence of her attorney, specifically the February 22, 2006 show cause hearing and the permanency planning hearing conducted on March 14, 2007. Respondent maintains that the circuit court's failure to adjourn the hearings in light of the absence of her counsel constitutes structural error, and requires that this Court reverse the order terminating her parental rights.

"An indigent parent involved in a hearing which may terminate his or her parental rights is entitled to appointed counsel." *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). The Legislature conferred this right in MCL 712A.17c(4), which provides that in termination of parental rights proceedings,

the Court shall advise the respondent at the respondent's first court appearance of all of the following:

- (a) The right to an attorney at each stage of the proceeding.
- (b) The right to a court-appointed attorney if the respondent is financially unable to employ an attorney.
- (c) If the respondent is not represented by an attorney, the right to request and receive a court-appointed attorney at a later proceeding.

The Michigan Court Rules additionally recognize a right to appointed counsel in termination proceedings. MCR 3.915(B)(1).

A parent's right to appointed counsel when facing termination of parental rights does not derive from the Sixth Amendment of the United States Constitution because child protective proceedings are civil in nature; the Sixth Amendment attaches only when a litigant faces the deprivation of personal liberty. *Lassiter v Dep't of Social Serv's*, 452 US 18, 26; 101 S Ct 2153;

68 L Ed 2d 640 (1981). Neither does the Due Process Clause of the Fourteenth Amendment provide an absolute right to court-appointed counsel in a termination proceeding. *Id.* at 31-32.

Respondent's right to counsel during this termination proceeding, therefore, derives entirely from Michigan statute and court rule. Any error arising from the circuit court's decision to conduct two hearings without respondent's counsel thus does not qualify as constitutional in nature. A preserved nonconstitutional error does not warrant reversal unless, after examining the entire record, it appears more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).<sup>1</sup>

Contrary to respondent's claim that she lacked counsel during the February 22, 2006 hearing, the record reflects the presence of counsel during most, if not all, of her guilty plea to the show cause petition. Additionally, the record reveals that at the outset of the plea, respondent waived her right to counsel. "The respondent may waive the right to the assistance of an attorney . . . ." MCR 3.915(B)(1)(c). Because the record supports both a waiver of respondent's statutory right to counsel and the presence of counsel during most of the plea, we reject as unfounded her claim of error involving the February 22, 2006 hearing.

We also find no error requiring reversal arising from counsel's absence at the permanency planning hearing conducted on March 14, 2007. On that date, respondent was incarcerated. The circuit court provided notice of the hearing to her retained counsel, and the record reveals no reason for his failure to attend. While a brief adjournment of the hearing may have been preferable to proceeding in counsel's absence,<sup>2</sup> the circuit court did not deny respondent's right to counsel at this hearing. Furthermore, the hearing did not result in the termination of respondent's parental rights. A permanency planning hearing is conducted "to review the status of the child and the progress being made toward the child's return home or to show why the child should not be placed in the permanent custody of the court." MCL 712A.19a(3). At the permanency planning hearing, "the court must determine whether the agency has made reasonable efforts to finalize the permanency plan." MCR 3.976(A). The court must also decide whether the child may be returned to the parents, and whether a petition to terminate parental rights should be filed. *Id.*

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<sup>1</sup> The record leaves unclear whether respondent, who remained incarcerated on March 17, 2007 and did not participate in the permanency planning hearing, knew or could have known that the permanency planning hearing occurred in the absence of any counsel on her behalf. To the extent that this issue may technically qualify as unpreserved, we nonetheless consider it because it involves a legal question, specifically whether the circuit court violated respondent's statutory or court-rule granted right to counsel, and the relevant facts necessary to facilitate review appear in the existing record. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007).

<sup>2</sup> The circuit court commented at the commencement of the permanency planning hearing, "It's unfortunate this is a permanency planning hearing. This is probably the most critical hearing in this whole case." This observation supports our view that the court at least should have considered making an effort to contact respondent's retained counsel before proceeding to conduct the hearing.

Respondent's retained counsel either elected not to attend the permanency planning hearing, or failed to notify the circuit court that respondent had discharged him. At that point, however, respondent had been incarcerated for almost three months, and the children had resided outside of her care for approximately a year. Had counsel attended the hearing, it seems virtually certain that the court would have reached the same result, to proceed with termination proceedings. Our conclusion is reinforced by the fact that despite having had ample opportunity to do so, subsequently appointed counsel made no challenge to the court's decision to order petitioner to file a supplemental permanent custody petition. Our review of the record convinces us that appointed counsel competently represented respondent during the termination hearing. We conclude that overwhelming evidence supported the circuit court's decision to authorize petitioner to proceed toward the termination of respondent's parental rights, and that any error related to the court's failure to adjourn the hearing did not prejudice respondent.

Respondent next contends that the circuit court utilized an inappropriate standard of proof when it terminated her parental rights. According to respondent, the circuit court failed to find clear and convincing evidence of a statutory ground for termination, but instead relied on an improper standard derived focused on the "best interests" of the children.

This Court reviews for clear error a circuit court's finding that a ground for termination has been established by clear and convincing evidence "and, where appropriate, the court's decision regarding the child's best interest." *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005) (internal quotation omitted); see also MCR 3.977(J). "A trial court's decision to terminate parental rights is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake had been made." *In re Gazella*, 264 Mich App 668, 672; 692 NW2d 708 (2005). "The best interests of the child may not justify a termination of parental rights without clear and convincing proof of the statutory grounds" for a permanent custody order. *In re Youmans*, 156 Mich App 679, 689-690; 401 NW2d 905 (1986).

After reviewing the record, we conclude that the circuit court understood and properly applied the applicable legal standards. The circuit court initially articulated the statutory grounds on which it relied to terminate respondent's parental rights: subsections (c)(i) and (ii). The court then described in some detail the facts relevant to its conclusion that the conditions that led to the adjudication continued to exist and would not be rectified within a reasonable time. The court noted respondent's admitted long-term use of controlled substances, and her failure to comply with court orders and the treatment plan. The court found that respondent had not participated sufficiently in substance abuse treatment or domestic abuse counseling, lacked suitable housing and employment, and failed to obtain her GED despite having had considerable opportunity to do so.

After finding clear and convincing evidence supporting the two statutory grounds for termination, the circuit court turned to consider the children's best interests. The court decided that no evidence existed that termination would contravene the children's best interests. Because the circuit court pursued a correct analysis in conformity with applicable legal standards, we reject respondent's second claim of error.

We also reject respondent's final argument that clear and convincing evidence did not support termination of her parental rights pursuant to subsections (c)(i) and (ii). The conditions

that led to adjudication included respondent's substance abuse, domestic violence issues, and inappropriate housing. Additional concerns arose during the case, including respondent's violation of court orders, her multiple arrests, and her failures to obtain employment and complete her GED program. Respondent received services, but failed to fully participate in most of them. At the time of the termination hearing, respondent's ability to parent her children had not improved since the court's assumption of jurisdiction, and in many respects had worsened. Further, no evidence tended to suggest that respondent would be in a position to care for her children at any time in the foreseeable future. She had a longstanding history of substance abuse and failed to meaningfully address this problem during the entire time her children spent in foster care. Similarly, respondent made only a belated and half-hearted effort to distance herself from Marcicky, despite his history of abusing her and the children. Even if respondent's release from jail had been imminent, the evidence established that she required inpatient substance abuse therapy before she could even be considered *potentially* able to parent the children.<sup>3</sup>

In summary, we conclude that the circuit court did not err when it found clear and convincing evidence establishing the statutory grounds for termination in subsections (c)(i) and (ii).

Affirmed.

/s/ Peter D. O'Connell  
/s/ Stephen L. Borrello  
/s/ Elizabeth L. Gleicher

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<sup>3</sup> Respondent insists that the circuit court's findings were erroneous because she had not tested positive for controlled substances for nearly a year, and she no longer subjected herself to domestic abuse. Respondent also suggests that petitioner did not afford her sufficient aid to reach her treatment goals. Respondent ignores, however, that at the time of the termination hearing, she had remained incarcerated for seven months and continued to await sentencing on outstanding charges. Respondent's ability to remain drug free and avoid domestic altercations did not result from her affirmative efforts, but occurred simply as the natural consequence of her incarceration.