STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ASHLEY SMITH, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

BRAD MATTHEW SMITH,

Respondent-Appellant.

UNPUBLISHED
December 16, 2008

No. 285097
Macomb Circuit Court
Family Division
LC No. 2008-000015-NA

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Respondent appeals as of right the family court's order terminating his parental rights to the minor child following his voluntary release of parental rights.[1] We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Respondent first argues that he was entitled to notice of the preliminary hearing and that because he did not receive notice, he was unable to knowingly and voluntarily waive the probable cause hearing. We disagree.

There is no evidence in the lower court record establishing that respondent was Ashley's legal father. A putative father's rights differ from those of a legally recognized parent. MCR 3.921(C); *In re Gillespie*, 197 Mich App 440, 446; 496 NW2d 309 (1992); see also *In re CAW*, 469 Mich 192; 665 NW2d 475 (2003). In termination proceedings, the family court has discretion to notify a putative father or to determine that a putative father is in fact a natural father. MCR 3.921(C)(1) provides in part that "[i]f the court finds probable cause to believe that an identifiable person is the natural father of the minor, the court shall direct that notice be served on that person in any manner reasonably calculated to provide notice to the putative father . . . ." According to MCR 3.921(C)(2), after notice has been provided to the putative

[1] We note that this case was initiated under the Juvenile Code, MCL 712A.1 *et seq.*, rather than under the Adoption Code, MCL 710.21 *et seq*. "[A] respondent can consent to termination of his parental rights under the juvenile code, in which case the judge need not announce a statutory basis for it." *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992).

father, the family court may determine that the putative father has been served in a manner calculated to provide notice and, if a preponderance of the evidence establishes that the putative father is the natural father of the minor, give the putative father 14 days to establish his relationship according to MCR 3.903(A)(7).[2]

In this case, respondent was provided notice on January 14, 2008, in the form of an order after a preliminary hearing. He was also provided notice of hearing and a summons on January 15, 2008, for the upcoming pretrial hearing. At the February 5, 2008, pretrial hearing both the prosecutor and respondent's attorney assured the court that they would inform respondent that he had 14 days to establish paternity. Because respondent was provided notice, but there is no evidence that he established himself as a "father" within the 14-day period for purposes of MCR 3.903(A)(7), he is not entitled to the same service and notice as afforded a non-custodial legal parent. *In re Gillespie*, *supra* at 445-446. Contrary to respondent's assertion, he was only a "putative father" under MCR 3.903(A)(23) and MCR 3.921(C). He was not a "father" under MCR 3.903(A)(7), he was not a "party" or "parent" under MCR 3.903(A)(17) and (18)(b), and he was technically not even a "respondent" pursuant to MCR 3.977(B)(2). Consequently, we conclude that he was not entitled to notice of the preliminary hearing.

Additionally, the court rule does not require the family court to secure the physical presence of a parent, but only implies that the court shall not deny a parent's right to be present at the hearing. *In re Vasquez*, 199 Mich App 44, 49; 501 NW2d 231 (1993). In this case, the court did not deny respondent's right to be present, and even provided respondent with counsel to appear on his behalf at the preliminary hearing. Further, respondent's parental rights were not in jeopardy at the time of the preliminary hearing.

Respondent argues that because he did not attend the preliminary hearing, he was unable to knowingly and voluntarily waive the probable cause hearing. Ashley was in the custody of her mother while respondent had been incarcerated for the preceding five years. Respondent's incarceration and unavailability to parent gave the court sufficient grounds to authorize the petition. Therefore, respondent lost virtually nothing by not being able to participate in the preliminary hearing. Even if he had participated and requested a probable cause hearing, the outcome would have been the same. Given respondent's ability to attend subsequent hearings where he was able to testify and present evidence, and considering that he was represented by counsel at all hearings, it is not inconsistent with substantial justice to allow the order following the preliminary hearing to stand. See MCR 2.613(A); see also *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 529; 730 NW2d 481 (2007) (observing that this Court "will not reverse on the basis of harmless error").

Finally, at no time during the proceedings did respondent raise the issue of notice in the family court. As the failure to serve respondent with respect to the preliminary hearing was not fatal to the court's exercise of personal jurisdiction, respondent should not now be heard to

[2] MCR 3.921(C)(1) does not require that a putative father be served with a copy of the summons and petition required by MCR 3.920(B)(3).

complain of inadequate notice since he did have notice of the later proceedings. *In re Parshall*, 159 Mich App 683, 691-692; 406 NW2d 913 (1987); see also *In re Gillespie*, *supra* at 446-447.

Respondent also argues the family court did not comply with certain provisions of MCL 710.29 at the release hearing, thus invalidating his release of parental rights. We disagree.

The family court did not abuse its discretion by failing to provide respondent with counseling related to the adoption of Ashley prior to the release of his parental rights. Contrary to respondent's assertion, MCL 710.29 only applies when the court accepts a release of parental rights under the Adoption Code, but does not apply to proceedings initiated under the Juvenile Code.[3] See, e.g., *In re Toler*, 193 Mich App 474, 477-478; 484 NW2d 672 (1992). Under the Juvenile Code, a full advice of rights is not required at the time of a voluntary release of parental rights.

We do acknowledge that a parent's decision to consent to the termination of his parental rights must be knowingly and voluntarily made. See *In re Burns*, 236 Mich App 291, 292; 599 NW2d 783 (1999).[4] But respondent indicated unequivocally and repeatedly that he had not been forced or coerced into releasing his rights and that he fully understood the decision he was making. He stated that he understood that he was permanently giving up his parental rights to Ashley, that his attorney had counseled him on the matter, that it was a well thought-out decision, and that he had no questions. The family court ensured that respondent's release of his parental rights was made knowingly and voluntarily, as it was required to do. Even though it was not required to do so, the court also complied with MCL 710.29 by advising respondent of his legal rights and explaining to him how those rights might affect him.

Lastly, respondent argues that the family court should not have terminated his parental rights because it did not investigate Ashley's best interests pursuant to MCL 710.29(6). He argues that the family court's determination was insufficient because the court merely stated that his release of parental rights was in Ashley's best interests without any investigation. Respondent's contention is without merit. As discussed above, the court was operating under the Juvenile Code and was not obligated to follow the statutory requirements of MCL 710.29(6). Although the family court only briefly inquired about respondent's relationship with Ashley and his period of incarceration, the evidence did not show that termination of respondent's parental rights was clearly contrary to in the child's best interests. MCL 712A.19b(5);[5] *In re Trejo*

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[3] Respondent's decision to consent to the termination of his parental rights did not transfer these proceedings from the Juvenile Code to the Adoption Code, and the family court was therefore not required to follow the requirements set forth in MCL 710.29. *In re Toler*, *supra* at 478.

[4] We recognize that the father in *Burns* consented to the release of his parental rights pursuant to the Adoption Code rather than the Juvenile Code. However, we perceive no reason why the same "knowing and voluntary" standard applied in *Burns* should not also apply to a respondent's decision to consent to the termination of his or her parental rights under the Juvenile Code.

[5] The Legislature has amended MCL 712A.19b(5), effective July 11, 2008. See 2008 PA 199. MCL 712A.19b(5) now provides that "[i]f the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights . . . ." However, the order of termination at issue in this

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Minors, 462 Mich 341, 354; 612 NW2d 407 (2000). Given the amount of time that Ashley lived outside her respondent's care, and considering that respondent's incarceration would continue for at least one additional year, the release of respondent's parental rights served Ashley's interests by promoting permanency and stability in her life. The history of respondent's relationship with Ashley demonstrated that the voluntary release of respondent's parental rights was in Ashley's best interests, and respondent neither established nor argued that Ashley's best interests would be served by an extended placement in foster care.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Patrick M. Meter

(…continued)

case was finalized before this 2008 amendment took effect.