

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of NICOLE LIBORIA KOSTELICH
and PIETRO RUSSELL FERRARA, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KELLY RUSSELL FERRARA,

Respondent-Appellant,

and

MELISA ANN KOSTELICH,

Respondent.

UNPUBLISHED

May 4, 2010

No. 295121

Wayne Circuit Court

Family Division

LC No. 03-421640

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Respondent Kelly Russell Ferrara appeals as of right from the trial court order terminating his parental rights to the minor children under MCL 712A.19b(3)(c)(i), (g), and (j). We vacate and remand for further proceedings before a different judge.

Respondent argues that the trial court plainly erred when it conducted an in camera interview with Nicole on June 11, 2009, and that the error affected respondent's due process rights. The children initially came into petitioner's care primarily on the basis of allegations of sexual abuse committed by a paternal uncle against Nicole and on respondents' failure to protect her from the abuse. During the proceedings, respondent did not object to the trial court's in camera meeting with Nicole. Therefore, this issue was unpreserved. *In re HRC*, 286 Mich App 444, 450; ___ NW2d ___ (2009). Because respondent did not object to the trial court's interview

with Nicole, this Court's review is limited to plain error affecting substantial rights. *Id.*¹ Under the plain error rule, a party must show actual prejudice, and reversal is only warranted if the error seriously undermined the fairness, integrity, or public reputation of the trial. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Whether the trial court's in camera interview violated respondent's due process rights presents a question of constitutional law that this Court reviews de novo. *In re HRC*, 286 Mich App at 450.

Respondent argues that the trial court plainly erred when it conducted an in camera interview with Nicole on June 11, 2009. At a dispositional review hearing on June 11, 2009, petitioner requested permission to file a petition for the permanent custody of Nicole and Pietro. During the hearing, the trial court stated, "I chatted with Nicole. She's about ten going on thirty." The trial court also stated that Nicole was very smart and she had a lot of insight. The trial court suspended respondent's and Kostelich's visitation. When asked why visitation was being suspended, the trial court stated, "Child doesn't wanna visit with the parents." The trial court also stated, "Child clearly feels scarred and has excellent insight and ongoing fears." The trial court stated that it would not continue to promote reunification and approved the filing of the petition for termination of parental rights.

An in camera interview is an ex parte communication that occurs off the record and in the absence of the other interested parties and their attorneys. *In re HRC*, 286 Mich App at 451. In the instant case, the trial court stated "I chatted with Nicole." At the termination hearing, Melisa Kostelich, the children's mother, was questioned about something that Nicole said on June 11, 2009. Kostelich's attorney objected, stating: "Judge, I don't believe she was in the courtroom because that was a meeting that the Court and the young lady had in chambers, not in the courtroom." Accordingly, the trial court and Nicole's "chat" constituted an in camera interview. *Id.*

A recent decision of this Court guides the analysis of respondent's argument. In *In re HRC*, the trial court found that the statutory grounds for termination had been proven by clear and convincing evidence. *In re HRC*, 286 Mich App at 449. However, before the trial court made a determination regarding the children's best interests, it held in camera interviews with the children. After the interviews, the trial court "considered the testimony and also the subsequent interviews of the children and all of the record as a whole," and found that termination was in the children's best interests. *Id.* at 450.

The respondents appealed, arguing that the trial court erred in conducting the in camera interviews and basing its best interests determination on those interviews in violation of their due process rights. After analyzing the use of in camera interviews in the context of the Child Custody Act, MCL 722.21 *et seq.*, and reviewing the statutory provisions of the juvenile code,

¹ We reject petitioner's claim that the issue was waived as opposed to forfeited. Respondent never expressed satisfaction with or approval of the court's in camera interview. See *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000).

MCL 712A.1 *et seq.*, this Court held that “there is no authority that permits a trial court presiding over a juvenile matter to conduct in camera interviews, on any subject whatsoever, with the children.” *In re HRC*, 286 Mich App at 453.² Accordingly, this Court found that the trial court had plainly erred in conducting the in camera interviews of the children. *Id.* at 454.

Next, this Court considered whether the error affected the respondents’ substantial rights because, as in the instant case, the trial court conducted the interviews without objection from either party. After balancing the private interest that was affected, the risk of an erroneous deprivation of that interest by the in camera interview, and the state’s interest or burden that additional or substitute procedures would require, this Court held that “the use of an unrecorded and off the record in camera interview in the context of a juvenile proceeding, for whatever purpose, constitutes a violation of parents’ fundamental due process rights.” *In re HRC*, 286 Mich App at 456. This Court vacated the trial court’s best interests determination and remanded for further proceedings in front of another judge because, without knowing the information that the trial court gleaned from the interviews, this Court could not determine whether the trial court would be able to set aside that information to make a new determination. *Id.* at 457.

Because a trial court presiding over a juvenile proceeding has no authority to conduct in camera interviews of the children involved in the case, the trial court plainly erred in interviewing Nicole. Given the plain error in interviewing Nicole, we must determine whether that error affected respondent’s substantial rights. It is clear from the court’s comments, discussed above, that the court relied on the information obtained in the in camera interview in declining to continue promotion of reunification, in approving the filing of the termination petition, and in suspending visitation. And it is also evident that the trial court relied on the in camera interview when it issued its findings of fact and conclusions of law relative to the determination of the statutory bases for termination and the children’s best interests. Specifically, the trial court stated:

How articulate do we expect a ten year old to be about some serious issues? She was very articulate to the Court – more articulate than a child needs to be at age ten.

* * *

Sexual abuse did happen. The ongoing serious domestic violence and the presence of the children has taken it’s [sic] toll and both things have destroyed the bond, *as so eloquently put by Nicole, and to expose a child to so much to be able to voice what she voiced*, I don’t think I’ve seen that in thirty years. Usually kids get mad, I want to be with my parents, but to really break that bond which has happened here, I don’t think I’ve seen it. [Emphasis added.³]

² Accordingly, we reject the argument of the children’s counsel that *In re HRC* only applies to in camera interviews relative to a best interests determination.

³ Petitioner’s argument that reversal is unjustified because the in camera interview occurred many months before the termination trial lacks merit. The court’s remarks at the time of
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The trial court stated that “the two most key things [in this case] are sexual abuse and severe domestic violence.” The court, while first noting that respondent had failed in regard to other matters such as counseling, housing, and drug screenings, essentially gave little if any weight to those matters in its termination ruling,⁴ stating:

You know, so regarding you, you can get a palace and you would never get these children back. You would never protect them. You’re too busy being violent to [those] you live with, the mother, and you don’t realize or recognize the sexual abuse, so you’re rights are terminated pursuant to MCL 712A.19[b(3)(c)(i), (g), and (j)].

The trial court, concerned chiefly with the violence and sexual abuse,⁵ was clearly swayed by Nicole’s in camera communications when making the decision to terminate respondent’s parental rights under all of the statutory grounds. There was actual prejudice to respondent, and the trial testimony does not convince us otherwise. At the termination trial, the only witnesses were the foster care worker assigned to the case and respondent mother. The foster care worker testified that respondent and the paternal uncle accused of committing the sexual abuse adamantly denied that any abuse occurred. She also indicated that there was no criminal prosecution of the uncle. The foster care worker further testified that Nicole was upset because respondent did not believe her claims of sexual abuse. Respondent mother testified that Nicole informed her of the sexual abuse and that she believed Nicole. This was the full extent of the testimony regarding Nicole and the sexual abuse, and the foster care worker’s testimony revealed strong denials of the abuse and the lack of a prosecution. Neither witness really explored matters of domestic violence. Thus, we must conclude that the trial court placed little reliance on the trial testimony in finding that sexual abuse and severe domestic violence occurred and damaged the children. Instead, the court was obviously convinced to rule as it did after hearing from the sexual abuse victim herself, Nicole, who, as suggested by the court’s comments, was also exposed to and damaged by the domestic violence. As acknowledged by the trial court, Nicole left quite an impression on the court.

Furthermore, the private interest at stake in this case was respondent’s fundamental liberty interest in the care and custody of his children. *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). The risk of an erroneous deprivation was substantial because respondent had no opportunity to learn exactly what Nicole told the trial court and, as a result, no opportunity to counter that information. In addition, respondent had no way of knowing the full extent of how the information influenced the trial court’s decision beyond the court’s statements on the record. There is also no way for this Court to properly review the information because there is no record of the interview to review. Accordingly, the trial court’s interview of Nicole “fundamentally and seriously affected the basic fairness and integrity of the proceedings below” and the trial court’s

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termination reveal that the earlier in camera interview still weighed heavy on the court’s mind.

⁴ Although the written findings of fact and conclusions of law discuss, in part, respondent’s failure to comply with the parent-agency agreement, the written opinion does not indicate that the failure was a basis on its own to support a ground for termination.

⁵ Again, it was the sexual abuse of Nicole that gave rise to this protective proceeding.

order must be vacated. *In re HRC*, 286 Mich App at 457. Because we do not know exactly what Nicole told the trial court, and because Nicole's sentiments deeply moved the court, we cannot conclude that the trial court would be able to set aside any information obtained in the in camera interview when making a new determination regarding termination and best interests.

This Court vacates the order terminating respondent's parental rights, remands for further proceedings, and orders that the matter be assigned to a different judge on remand to make findings regarding the termination of respondent's parental rights. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Joel P. Hoekstra