STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 2, 2010

In the Matter of HEIER/SCHELLER, Minors.

Nos. 296235
Macomb Circuit Court
Family Division
LC Nos. 2008-000705-NA
2008-000706-NA

In the Matter of HEIER/SCHELLER, Minors.

No. 296391
Macomb Circuit Court
Family Division
LC Nos. 2008-000705-NA
2008-000706-NA

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

In these consolidated appeals, the mother appeals as of right from an order that terminated her parental rights to her daughter, NRH, and son, DLS, pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). The father appeals as of right from an order that terminated his parental rights to DLS pursuant to MCL 712A.19b(3)(c)(*i*), (g), (j), and (l). We affirm.

Both parents pleaded no contest to allegations in a December 2, 2008, petition seeking temporary custody of the children. The petition alleged that NRH was previously made a temporary court ward in 1996 based on allegations of neglect. The mother was also placed on the Central Registry in 2003 after leaving her then toddler son alone in a car on a cold day. Children's Protective Services had investigated the mother at least 14 times since 1995. The petition alleged that the mother's failure to benefit from past services placed both children at high risk of neglect. Since September 2008, numerous workers witnessed the mother's cruel behavior toward NRH, calling the girl "brat, bitch, byotch and crybaby." The mother once dragged her daughter out of her aunt's home by her hair. The mother blamed NRH for her January 2008 arrest, which resulted from the mother assaulting the girl and then driving drunk, leading police on a high-speed chase. Recent psychological examinations revealed that the mother was an aggressive, irresponsible individual with difficulty managing her anger. The mother needed to address her medication needs. As for the father, his psychological assessment revealed that he could "be very passive and avoid conflict until things get completely out of

control." The petition alleged that both parents had a history of criminal conduct. The petition further alleged that the family was in arrears on rent and had no heat or hot water.

The parent-agency agreement (PAA) required both parents to: (1) attend parenting classes: (2) submit to psychological evaluations; (3) submit to substance abuse assessments; (4) attend individual counseling; (5) submit to random drug screens; (6) visit with the children; (7) maintain a legal source of income; and, (8) maintain suitable housing. Having determined that the parents were either noncompliant with the PAA or had not benefited from the services, the worker filed a petition to terminate parental rights in September 2009.

The father argues that the trial court erred in terminating his parental rights. We disagree and find that the trial court did not clearly err in finding that the statutory grounds for termination of the father's parental rights were established by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000); MCR 3.977(J). The father acknowledged having his rights terminated to two older children because he chose their mother over his children. He had recently lost his job and was living with his adult son. Asked by the children's attorney, the father could not articulate a plan of how he would care for his young son DLS if the boy were returned to him. The father testified, "The plan is I'm going to stay with my son until I can get my own place, which, you know, like right now I'm not employed because of my health issues. I might be going on disability. I might, you know, I don't know what's going to happen in the next couple months, but the plan is for me to get my own place so I can have a place for the kids."

The father's testimony provided clear and convincing evidence to terminate his parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (l). There was no dispute that the father's parental rights to his two (now adult) children were terminated in 1987, "[b]asically, because I didn't leave the mother and go after the kids on my own." This was in keeping with the psychological assessment that the father could be very passive and would avoid conflict until things got completely "out of control." That was one of the reasons that individual therapy was so critical for the father. Still, he only sporadically attended therapy through a methadone clinic, where he had been receiving methadone since 2003 in his battle against a heroin addiction.

DLS had asked his father to provide separately for him, and the father had indicated a desire to do so earlier in the case, but there was no follow-through. On the eve of the termination hearing, the father began the process of moving out of the trailer he shared with the mother and into a home with his adult son, leaving no time for an evaluation of the adult son's home. Additionally, the father had lost his job due to absences from recent illnesses and had no legal source of income. It was clear that he was not in a position to care for DLS, having no income or housing. The father argues that he should have been given more time to demonstrate an ability to provide for DLS, but the child had already been in care for over a year. Not only had there been no progress, the father's circumstances had actually worsened. He was unemployed and essentially homeless. The father made no progress in individual counseling. This is evidenced by the fact that the father would do nothing while the mother verbally assaulted NRH during their visits.

It was clear that the conditions leading to adjudication continued to exist without a reasonable likelihood that the conditions would be remedied within the near future. Additionally, the father was without the means to provide for his child's care and custody.

Given the father's history of allowing his children's mothers to mistreat them, DLS was potentially at risk of harm if returned to the father because the father lacked the psychological skills to protect the child. Finally, the father's parental rights to his other two children had been terminated after proceedings under the juvenile code.

Having found statutory grounds for termination proven by clear and convincing evidence, the trial court then had to determine whether termination of the father's parental rights was in DLS's best interests. MCL 712A.19b(5). The evidence showed that the father would take a passive role during visitation. He and the child got along well together and their visits were especially good when the mother was incarcerated and unable to attend. There was never an allegation that they lacked a bond. Still, the boy had been in care for over a year. The father made insufficient efforts toward reunification during that time. After DLS had been in foster care a year, his father's situation had only worsened. The child was entitled to permanence and stability.

For her part, the mother of both children claims that she received ineffective assistance of counsel when her no contest plea was not knowingly and understandingly made and was defective. Though couching her argument as one of ineffective assistance of counsel, the mother is actually attacking the trial court's exercise of jurisdiction. A parent's allegations concerning matters regarding the trial court's exercise of jurisdiction must be raised on direct appeal and may not be collaterally attacked in a subsequent appeal of an order terminating parental rights. *In re Hatcher,* 443 Mich 426, 436; 505 NW2d 834 (1993). The mother's unpreserved claim that the trial court failed to advise her of the consequences of her plea is reviewed for plain error, requiring the mother to show that: (1) an error occurred; (2) the error was clear or obvious; and, (3) the error affected her substantial rights. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999). Additionally, the mother failed to file a motion for a new trial or request a hearing in the trial court, as required by *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). Therefore, her allegation of ineffective assistance of counsel has not been preserved for appellate review, and review is limited to mistakes apparent on the record. *People v Davis,* 250 Mich App 357, 368; 649 NW2d 94 (2002).

The adequacy of the advice of rights required for acceptance of a plea in a child protective proceeding is reviewed on appeal under the same standard of review used to determine the adequacy of advice of rights in proceedings involving a criminal guilty plea. *In re Waite*, 188 Mich App 189, 192; 468 NW2d 912 (1991). The question is whether the decision to enter into the plea was knowingly and voluntarily made. MCR 3.971.

At the plea hearing, a discussion took place regarding the December 2, 2008, petition, which amended slightly the petition that was originally filed on November 5, 2008. The amended petition added a line indicating that NRH's father was unknown. The amended petition also indicated that the parents were in arrears on rent, striking language in the original petition that they were facing eviction. Finally, the amended petition contained two separate paragraphs concerning the parents' criminal history. The trial court then assured that the parents had reviewed the amended petition and also confirmed that the pleas were voluntarily made.

The mother claims that the referee erred in accepting her no contest plea using only the petition as a factual basis for the plea, but the mother provides no case law or authority to support her position. A party may not simply state its position and leave it to the Court to search

for support of that position. *Badiee v Brighton Area Schools*, 265 Mich App 343, 357; 695 NW2d 521 (2005).

The referee clearly complied with MCR 3.971(B)(3) in advising the mother of the rights she was giving up by foregoing the right to trial. The referee did not separately advise the mother of the allegations in the petition under MCR 3.971(B)(1); nevertheless, it was obvious from the record that her attorney had reviewed the relevant information with his client. The mother may not have seen the "amended" petition, but the amendments were not substantive changes from the November 2008 petition, which the mother admittedly reviewed. The mother also declined the referee's offer to go off the record and discuss the petition further with her attorney. There is simply no reason to believe that the mother did not know and understand the allegations against her.

However, we agree that the referee failed to advise the mother of the consequences of her plea, including that the plea could later be used as evidence in a proceeding to terminate her parental rights, as required by MCR 3.971(B)(4). Even so, our review of the record confirms that any failure to advise the mother that the court could consider her no contest plea as evidence in later termination proceedings was harmless. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009), citing *Carines*, 460 Mich at 763-764.

The evidence presented at the termination hearing showed that the mother was verbally abusive and assaultive with her daughter. Her angry and combative attitude was on display during visits. She called NRH names and continuously blamed her for the removal of children. The 15-year-old daughter was often distraught after seeing her mother, leading to an order that the visits take place only in a therapeutic setting. Even that did not work. The mother's behavior was deemed abusive by the therapist and visits were ultimately suspended. The foster care worker did not believe that the two of them shared a bond. NRH's emotional needs were not being met and she knew she could not count on her mother. The mother clearly needed help in controlling her behavior, as evidenced by her frequent outbursts and speeches during the proceedings. Still, she did not comply with the PAA by attending individual therapy. The mother's behavior had not improved since the inception of the case. Because the testimony at the termination hearing independently established the factual bases for the adjudication, the court did not need to rely on the mother's plea as evidence at the termination hearing. Thus, the mother could not have endured substantial prejudice from the failure to explicitly apprise her that her plea could later be considered as evidence. *Carines*, 460 Mich at 763-764.

Regarding the mother's claim that she received ineffective assistance of counsel, the right to counsel guaranteed by the United States Constitution, US Const, Am VI, applies to child protective proceedings and the principles of effective assistance of counsel developed in the context of criminal law apply by analogy in termination of parental rights proceedings. *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000). Where a party claims that counsel was ineffective during a plea process, the focus is on whether the plea was knowingly and voluntarily entered into. *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001), modified on other grounds 468 Mich 233 (2003). The question is not whether counsel was right or wrong in rendering advice, but whether the advice was within the range of competent advice. *People v Thew*, 201 Mich App 78, 89-90; 506 NW2d 547 (1993).

It was clear that the mother entered her no contest plea knowingly and voluntarily. Her attorney advised the court that he had discussed the allegations in the petition with the mother at the preliminary examination. The mother declined any further discussions regarding the allegations. Again, we conclude that the result of the proceedings would not have been any different, based on the overwhelming evidence regarding the mother's unfitness as a parent.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly