

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of WANGLER/PASCHKE, Minors.

FOR PUBLICATION
May 27, 2014

No. 318186
Sanilac Circuit Court
Family Division
LC No. 07-035009-NA

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

GLEICHER, J. (*dissenting*).

Because child protective proceedings implicate constitutionally protected liberty interests, our Supreme Court promulgated court rules designed to safeguard parents' due process rights. One rule, MCR 3.971, addresses the procedures that control a court's assumption of jurisdiction over the child. Before a court may exercise jurisdiction based on a parent's plea, it must satisfy itself that the parent knowingly, understandingly, and voluntarily waived certain rights. MCR 3.971(C)(1). Here, no dialogue between court and parent took place. The mediation procedure employed as a substitute for an adjudicative trial improperly bypassed the due process protections enshrined in the court rules. Thus, in my view the court never obtained jurisdiction.

After ignoring due process requirements for pleas of admission, the circuit court sidestepped MCR 3.977(E)(3), which provides that when termination occurs at initial disposition, only legally admissible evidence may be introduced. And because termination occurred at initial disposition, respondent's appeal does not qualify as a collateral attack. Accordingly, I respectfully dissent from the majority's contrary conclusions and would vacate the termination order.

I. BACKGROUND

In January 2012, the Department of Human Services (DHS) filed a petition to remove the respondent-mother's three children from her custody based on respondent's heroin addiction and her violent relationship with her live-in boyfriend. At the preliminary hearing, respondent conceded that probable cause existed to take her children into care and to continue their foster placement. The family court referee ordered the parties to participate in a pilot mediation program.

Mediation occurred on February 28, 2012. A signed "mediation resolution" provided that "[b]ased on the agreement of all parties, the mother's Plea of Admission and the issue of

jurisdiction will be held in abeyance for a period of six months.” Respondent stipulated to a case service plan, that visitation with the children would be supervised at the discretion of the DHS, and that the court would schedule a “review hearing” within 90 days. The family court judge assigned to the matter signed the agreement with the notation, “This Mediation Agreement is the order of the Court.”

That same day, the parties placed into the court record a document titled, “Entry of plea pursuant to MCR 5.971 as part of mediation.”¹ The document provided:

3. I am a participant in this mediation; I understand the allegations in the petition regarding the child(ren) identified on this document and I waive (give up) my right to have those allegations read to me on the record or stated to me in writing; I have read the petition.
4. I understand I have the right to an attorney at this mediation and every other hearing this matter.
5. If the Court accepts my plea of admission or no contest, I understand I will give up the following rights:
 - a) To have a trial before a judge or a jury;
 - b) To have the petitioner prove the allegations in the petition by a preponderance of the evidence (more than half);
 - c) To have witnesses against me appear and testify under oath at the trial;
 - d) To cross-examine (meaning “to question”) the witnesses;
 - e) To have the court order to come to the trial any witnesses I believe could testify in my favor, or to subpoena them.

* * *

7. I understand the plea, if accepted by the court, could later be used to terminate my parental rights to the child(ren) identified on this document.
8. I know I do not have to offer this plea; I have made up my own mind to do it.
9. I have thought about everything that might happen if the court accepts this plea.

¹ MCR 5.971 was superseded by MCR 3.971 in 2003, nine years before this plea was entered.

10. I understand everything in this document.
11. Nothing has been promised to me unless a plea bargain has been described on the attached mediation report form.

On the plea form, respondent admitted the allegations in paragraphs 8-14 of the DHS's January 11, 2012 petition. Specifically, respondent admitted that a Children's Protective Services case was opened in November 2011, due to domestic violence and drug abuse. Respondent conceded that she had agreed to services at that time but those services insufficiently protected the children from continuing harm. Respondent admitted that she had not maintained contact with her caseworker, rendering him or her unable to monitor the children's safety. Respondent also supplied no verification that she was receiving treatment for her substance abuse and had tested positive for opiates and cocaine at her random drug screens. She further admitted the domestic violence incident between her and her boyfriend.

Respondent provided no testimony in conjunction with the mediation and no evidence of record suggests that the court made inquiry to ascertain whether she intelligently and voluntarily agreed to the plea abeyance procedure, or whether the plea was accurate.²

Over the next several months, the DHS provided services to respondent consistent with the case service plan. Respondent was generally uncooperative. The court conducted periodic "dispositional review" hearings that respondent failed to attend. At a January 31, 2013 hearing, the caseworker indicated that the agency wanted to proceed toward termination given respondent's lack of progress. The court noted that no adjudication order had been entered:

[I]f there hasn't been an established jurisdictional level, based on the mediation, *I will take at this point, formal jurisdiction as an Act 87 ward*. I think there probably is an order or something to that effect in the file, but if there's not, there will be as of today based . . . on the stipulated mediation results. That's the purpose, my understanding, of the mediation was to avoid the need for a Jury trial and findings and putting people through that. Now, the failure to comply since August . . . by the mother is a post-mediation event, so I think that I can go back and say that we have a basis for jurisdiction, we have a basis for placement. [Emphasis added.]

The court "ma[d]e a finding" that respondent had "absented herself." The court then approved the DHS's request to file an amended petition seeking termination of parental rights.

On February 4, 2013, the court formally entered an "order following dispositional review/permanency planning hearing" An attached page provided, "Based upon the stipulated Mediation Resolution, the court takes formal jurisdiction of the minor children as an Act 87

² The lower court docket sheet indicates that a dispositional review hearing occurred on February 29, 2012. No such hearing took place. Rather, the court recorded receipt of the mediation agreement and accompanying document on that date.

Ward” and “DHS may file a supplemental pleading setting forth termination of parental rights of any of the three parents, if warranted. Court is not ordering DHS to file the petition.”

On March 13, 2013, the DHS filed a supplemental petition. The petition described the mediation agreement and the offered services, as well as respondent’s failure to comply with and benefit from her case service plan and her disappearance from the proceedings. The DHS alleged that respondent had not rectified the conditions that led to adjudication and had deserted her children, a new ground supporting termination. The DHS sought termination pursuant to MCL 712A.19b(3)(a)(ii) (desertion), (c)(i) (failure to remedy the conditions leading to adjudication and inability to do so within a reasonable time), and (g) (failure to provide proper care and custody).

The court conducted neither an initial dispositional hearing nor any dispositional review hearings between the January 2013 adjudication and the June 26, 2013 termination hearing. After taking testimony from the DHS caseworker and hearing argument from the parties, the court took a termination ruling under advisement. The court thereafter found termination supported under all cited factors and determined that termination served the children’s best interests.

II. IMPROPER ADJUDICATION

I respectfully disagree with the majority’s determination that respondent’s attack on the adjudication order qualifies as collateral. As stated by the majority, a trial court’s jurisdictional decision cannot be attacked collaterally following the termination of parental rights. *In re SLH*, 277 Mich App 662, 668; 747 NW2d 547 (2008).

That is true, however, only when a termination occurs following the filing of a supplemental petition for termination after the issuance of the initial dispositional order. If termination occurs at the initial disposition as a result of a request for termination contained in the original, or amended, petition for jurisdiction, then an attack on the adjudication is direct and not collateral, as long as the appeal is from an initial order of disposition containing both a finding that an adjudication was held and a finding that the children came within the jurisdiction of the court. [*Id.* at 668-669.]

The court did not take jurisdiction over the children until February 2013, when it entered the plea secured during the mediation session. No hearing occurred on that date. The court then “proceeded to determine at that initial dispositional hearing whether respondent[’s] parental rights should be terminated.” *In re VanDalen*, 293 Mich App 120, 131; 809 NW2d 412 (2011). The June 26, 2013 hearing constituted the initial dispositional hearing following adjudication. Therefore, respondent is free to challenge the adjudication as well as the termination.

The majority holds that the February 4, 2012 hearing at which the court took jurisdiction qualified as the initial dispositional hearing, triggering respondent’s right to appeal the

adjudication as of right pursuant to MCR 3.993(A)(1).³ However, the court rules provide that unless the initial dispositional hearing “is held immediately after the trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920.” No evidence supports that the court properly noticed or ever actually scheduled a dispositional hearing. Nor did the court ever enter an order of disposition as required under MCR 3.973(F)(1), which would have started the clock for appellant’s appeal as of right to the adjudication.

Moreover, the process by which the court took jurisdiction over the children contravened the court rules. A court may take jurisdiction over a child only if “at least one statutory ground for jurisdiction in MCL 712A.2(b)” is proven at an adjudicative trial pursuant to MCR 3.972, or following a plea to the allegations in the jurisdictional petition obtained pursuant to the procedures detailed in MCR 3.971. *In re SLH*, 277 Mich App at 669. Participation in mediation is not an invitation to circumvent due process. Here, the court lacked the authority to take jurisdiction over the children because it did not follow the procedures mandated by the court rules.

MCR 3.971 provides for the acceptance of pleas of admission or no contest to court jurisdiction. Subsection (B) demands the court to advise a respondent of various rights before accepting a plea. That advice must be “on the record or in a writing that is made a part of the file.” MCR 3.971(B). MCR 3.971(C) places duties on the court that simply cannot be extinguished by mediation:

(1) *Voluntary Plea*. The court shall not accept a plea of admission or of no contest *without satisfying itself* that the plea is knowingly, understandingly, and voluntarily made.

(2) *Accurate Plea*. The court shall not accept a plea of admission or of no contest without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true, *preferably by questioning the respondent unless the offer is to plead no contest*. If the plea is no contest, the court shall not question the respondent, but, by some other means, shall obtain support for a finding that one or more of the statutory grounds alleged in the petition are true. The court shall state why a plea of no contest is appropriate. [Emphasis added.]

There is no record that the court satisfied itself that respondent’s plea was voluntary or accurate. In February 2012, the court memorialized the agreement without taking testimony. According to the prosecutor, it was common practice to simply fax the mediation agreement and any plea to the court. This practice violates the court rules. The court conducted no analysis to

³ Notably, petitioner disagrees with this analysis. Petitioner contends that the adjudication occurred in February 2012, contemporaneous with the mediation. According to petitioner, the hearing that followed the mediation in May 2012, “was docketed and noticed on [sic] as a Review Hearing, although it probably should have been called a disposition hearing.”

“satisfy[] itself” that the plea was voluntary as mandated by MCR 3.971(C)(1). The court replicated this error in February 2013, when it entered the plea with no consideration of its voluntariness. The court also made no attempt to test the accuracy of the plea, either when the agreement was reached or when the court entered the order. MCR 3.971(C)(2) clearly forbids a court from entering a plea without determining its accuracy.

The court’s action even violated the mediation agreement. The agreement provided that the plea of admission would be held in abeyance. The agreement did not state that the plea would be deemed accurate at a remote time when the plea was accepted as entered by the court. The agreement did not grant permission to avoid court rule procedures adopted to protect a parent’s fundamental rights.

The court compounded its errors after the 2012 filing of the mediation agreement. MCR 3.973(A) provides for dispositional hearings only after the child is “properly within [the court’s] jurisdiction.” In my view, the children never properly came within the court’s jurisdiction, and the court lacked authority to conduct any dispositional review hearings in the interim.

III. TERMINATION BASED ON INADMISSIBLE EVIDENCE

Assuming that a valid adjudication took place, termination of respondent’s parental rights was accomplished at an initial dispositional hearing. Pursuant to MCR 3.977(E)(3), the court was required to find by “clear and convincing legally admissible evidence” that termination was supported by at least one statutory ground. And because the prosecutor sought termination based on a supplemental petition, legally admissible evidence was required. *In re DMK*, 289 Mich App 246, 258; 796 NW2d 129 (2010). Respondent claims, and I agree, that termination was based on hearsay evidence in violation of these rules.

Jessica Holtrop was the sole witness at the termination hearing. Holtrop was the Sanilac County caseworker assigned in May 2012, four months after the children’s removal from their mother’s care. The children had since been moved—the younger two into the care and custody of their fathers, one in Ogemaw County, and the eldest into the care of his step-grandparents. Respondent had also moved—she was incarcerated briefly in Wayne County and remained there after her release. Accordingly, “courtesy” caseworkers were assigned in Ogemaw and Wayne counties. Petitioner elected against presenting any other caseworker’s testimony at the hearing. Petitioner also chose not to present the testimony of any service provider. As a result, Holtrop provided secondhand reports.

In relation to respondent’s drug testing requirement, the court improperly allowed Holtrop to testify about a positive drug screen before she was assigned to the case. Holtrop had acquired personal knowledge since her involvement, however, that respondent’s participation in required drug screens had been poor. She testified that respondent failed to call in or appear when under court order to be tested twice a week and appeared only four times during a period when daily testing was required.

Holtrop admitted that she had no personal knowledge regarding respondent’s performance in substance abuse treatment. She reported information relayed by the provider that respondent had completed intake procedures in June 2012. Thereafter respondent attended only

three appointments and the provider discharged her for noncompliance. Holtrop was able to testify from personal experience that respondent provided no information indicating that she had found alternative substance abuse treatment. Holtrop suspected that respondent had transportation issues that impeded her participation in services. Accordingly, in the fall of 2012, Holtrop referred respondent to various outreach services that travelled to the client. Holtrop testified that the outreach substance abuse treatment provider indicated that it cancelled services on January 24, 2013, because respondent failed to call in to make appointments and the provider could not reach her. Holtrop claimed that she did not make additional referrals after that point because respondent had not contacted her and was not returning her calls.

Holtrop also testified regarding respondent's participation in a mixed parental education/counseling outreach program. Respondent allegedly took part in five sessions but the counselor reported that respondent showed "minimal involvement." After these five sessions, respondent stopped participating. The counselor informed Holtrop that respondent either was not home or did not answer her door when they came. Holtrop admitted she had no personal knowledge of respondent's participation during her in-home parenting classes. Rather, she repeated the counselor's report that respondent "presented as very frustrated and unwilling to work on the issues that needed to be worked on."

Holtrop testified that respondent was permitted supervised visitation with her children between January 11 and August 2, 2012. Only five visits occurred during that time, despite that respondent was allowed weekly parenting time. Three of the visits occurred before Holtrop was assigned the case. Moreover, Holtrop did not supervise the visits—the eldest child's step-grandparents who served as his foster placement, supervised visitation with the children. They reported to Holtrop that respondent was "very distracted" during the visits and did not "interact with the children as fully as a mother should." She also testified that the middle child's courtesy worker in Ogemaw County repeated the child's report that he did not want to return to his mother's care and custody because of her drug use. Holtrop was aware that respondent had telephone contact with her eldest son, but she was uncertain regarding the frequency of those contacts. Holtrop also testified, "I was told that she did send [the children] letters when she was incarcerated" in September of 2012. Holtrop further testified that she knew respondent failed to attend several supervised parenting time sessions because they took place in West Branch and she was living in Decker and then Wayne County, with no transportation to the distant visits.

Respondent's conduct was far from commendable. Nevertheless, the court rules required that legally admissible evidence support the grounds for terminating her parental rights. The vast majority of petitioner's evidence was hearsay from Holtrop regarding the statements and reports of others. Because of the irregular and improper manner in which the court took jurisdiction, petitioner incorrectly believed it such hearsay evidence would suffice. I would vacate the order terminating respondent's parental rights and remand for a new hearing at which respondent would face admissible evidence in support of petitioner's claims.

/s/ Elizabeth L. Gleicher