STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
July 29, 2010

In the Matter of E.L.B. Holbin-Hudson, Minor.

No. 294739
Macomb Circuit Court
Family Division
LC No. 2008-000545-NA

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Respondent, the mother of the involved minor child, appeals as of right a circuit court order terminating her parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j). We affirm.

In September 2008, respondent pleaded no contest to a Department of Human Services (DHS) petition's allegations that she "is currently homeless," had "a history of unstable housing" and untreated mental illness and substance abuse issues, and was on probation for assault and home invasion charges.[1] The circuit court exercised jurisdiction over the child, and ordered respondent to pursue the following elements of a parent-agency agreement: (1) a psychological evaluation and any resultant recommendations, (2) a substance abuse assessment and treatment, including random drug screens, (3) maintenance of stable housing and a legal source of income, (4) parenting classes, (5) a domestic violence assessment and treatment, (6) supervised parenting time, and (7) avoidance of legal entanglements.

Between September 2008 and August 2009, when the termination hearing commenced, respondent achieved minimal and sporadic progress toward her treatment plan elements. A DHS caseworker and respondent testified at the hearing. The evidence at the hearing reflected that respondent did not have suitable housing or employment at the time of the hearing, had not adhered to the recommendations of her psychological evaluation to engage in aggressive and long-term psychiatric and psychological treatment, had not seen the child since January 2009, submitted no entirely negative drug screens over the course of the proceedings, did not regularly attend counseling or meetings to address her substance abuse issues, and was arrested on multiple occasions during the proceedings, including for heroin and cocaine possession. The

[1] Respondent father also pleaded no contest to some of the petition's allegations about him. The father, who died during the proceedings, is not a party to this appeal.

circuit court therefore found that clear and convincing evidence warranted terminating respondent's parental rights.

Respondent initially challenges the circuit court's exercise of jurisdiction over the child on the basis that the court neglected to advise her that it could consider the plea as evidence in a subsequent termination hearing, as mandated by MCR 3.971(B)(4). However, "a probate court's [exercise of] jurisdiction in parental rights cases can be challenged only on direct appeal, not by a collateral attack." *In re Powers*, 208 Mich App 582, 587; 528 NW2d 799 (1995), citing *In re Hatcher*, 443 Mich 426, 439; 505 NW2d 834 (1993); see also *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005) ("Matters affecting the court's exercise of its jurisdiction may be challenged only on direct appeal of the jurisdictional decision, not by collateral attack in a subsequent appeal of an order terminating parental rights."). Furthermore, respondent's counsel waived any claims relating to the adequacy of the plea-related advice given by the circuit court, in light of counsel's expressed agreement with the court's query, "[D]o you believe I've adequately explained your rights?" *Cadle Co v City of Kentwood*, 285 Mich App 240, 254-255; 776 NW2d 145 (2009).

Even treating the sufficiency of plea advice claim by respondent as merely unpreserved constitutional error, our review of the record confirms that any failure to advise respondent that the court could consider her no contest plea as evidence in later termination proceedings did not affect her substantial rights. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The caseworker and respondent both testified at the termination hearing concerning the conditions that led to the child's removal from respondent's care and his adjudication as a temporary court ward, i.e., homelessness, untreated mental health issues, illegal drug use, and respondent's probationary status. Because the testimony at the termination hearing independently established the factual bases for the adjudication, the court did not need to rely on respondent's allegedly improper plea as evidence at the termination hearing. Respondent thus could not have endured substantial prejudice from the court's neglect to explicitly apprise respondent that her plea could later be considered as evidence. *Carines*, 460 Mich at 763-764.

Respondent next insists that the circuit court violated her right to due process by failing to strictly adhere to the notice requirements contained in the Indian Child Welfare Act (ICWA), 25 USC 1901, *et seq*. Given that respondent did not preserve this issue for appellate review, we again consider only whether any plain error in this regard affected respondent's substantial rights. *In re Williams*, 286 Mich App at 274. "Whether the circuit court failed to satisfy a notice requirement of the ICWA is a question of law, which this Court reviews de novo." *In re TM (After Remand)*, 245 Mich App 181, 185; 628 NW2d 570 (2001).

We find no substantiation for respondent's position that the circuit court did not adequately adhere to the ICWA notice requirements. The circuit court complied with MCR 3.965(B)(9) by inquiring at the September 28, 2008 hearing whether either respondent or the child's father possessed any Native American heritage. Each parent replied negatively, and these denials relieved the circuit court from then embarking on ICWA tribal notification efforts or the other procedures applicable to American Indian children in MCR 3.980. The first mention of record that the child might have some Native American heritage occurred on September 23, 2009, the date set for a continued termination hearing, when the child's maternal grandmother made the assertion that the child had Native American heritage in a Cherokee tribe. The circuit

court adjourned the termination hearing until October 15, 2009. Between these dates, consistent with the mandates of 25 USC 1912(a), petitioner apparently notified a Cherokee tribe of the pending proceedings regarding the child.[2] *In re TM*, 245 Mich App at 188 (explaining the mandatory nature of notice irrespective of at what point in child protective proceedings potential Indian heritage is ascertained, and finding that "because the trial court was informed that [the child] was possibly an Indian child . . . , petitioner was required to send notice to the applicable tribe or tribes, by registered mail, return receipt requested, ..."). At the outset of the October 15, 2009 continued termination hearing, respondent's counsel proffered into evidence, and the circuit court admitted, a letter from the Cherokee Nation in Oklahoma advising the child's foster care worker that the "the Indian Child Welfare Program has examined the tribal records and the above named child/children cannot be traced in our tribal records through the child/children and the adult relative(s) listed above." The letter added, "The above named child/children will not be considered an 'Indian child/children' in relationship to the Cherokee Nation as defined in the . . . [ICWA, 25 USC 1903(4)]. Therefore, the Cherokee Nation is not empowered to intervene in this matter." In summary, although the record does not clearly establish who notified the Cherokee Nation of Oklahoma, it is eminently clear that the tribe received notice in satisfaction of the goal contained in 25 USC 1912(a), and that no plain error occurred in this respect. *Carines*, 460 Mich at 763-764; *In re TM*, 245 Mich App at 188-189 (emphasizing that "because the record shows that all three federally recognized Cherokee tribes and the appropriate office of the Bureau of Indian Affairs received actual notice, and no tribe came forward, the court's order terminating respondent's parental rights need not be set aside for failure to comply with the notice provisions of the ICWA."). Because the child did not qualify for membership in the tribe, the circuit court correctly applied the termination of parental rights standards set forth in Michigan law.[3]

Respondent additionally complains that the circuit court deprived her of due process by not allowing her sufficient time to comply with the terms of her parent-agency agreement. Whether the proceedings comported with due process principles presents an issue of constitutional law that we consider de novo. *In re Rood*, 483 Mich 73, 91 (opinion by Corrigan, J.); 763 NW2d 587 (2009). In light of respondent's failure to raise this issue in the circuit court, we review the issue only to ascertain whether any plain error affected respondent's substantial rights. *In re Williams*, 286 Mich App at 274.

"[A] parent is entitled to procedural due process if the state seeks to terminate h[er] parental rights. The state must make reasonable efforts to notify h[er] of the proceedings and allow h[er] a meaningful opportunity to participate." *In re Rood*, 483 Mich at 121-122 (opinion by Corrigan, J.). In this case, the circuit court and petitioner ensured that respondent had notice

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[2] The record does not clarify what party or person notified the tribe. However, the tribe addressed its return letter to respondent's DHS caseworker.

[3] With respect to respondent's suggestion on appeal that the circuit court should have entertained testimony on this issue by respondent's mother, respondent never insinuated before the court that she wished to present such testimony by her mother. In light of respondent's failure to explain on appeal what, if any, relevant information respondent's mother might have supplied, we detect no plain error affecting respondent's substantial rights. MCR 2.613(A); *In re Williams*, 286 Mich App at 274.

of all proceedings, all of which respondent or her counsel attended.[4] The court and petitioner also undertook reasonable efforts to afford respondent a meaningful opportunity to rectify the conditions that caused the child's removal from her custody. See MCL 712A.18f(1). The court complied with the statutes and court rules governing the periods for conducting dispositional review and permanency planning hearings. See MCL 712A.19(3), MCL 712A.19a(1); MCR 3.973(F) and (G), MCR 3.975, MCR 3.976(B)(2). Respondent entered into a parent-agency agreement, and over the course of nearly a year petitioner offered respondent extensive services intended to rectify her substance abuse, mental health issues, and homelessness; the services included housing assistance, inpatient and outpatient substance abuse treatment, substance abuse counseling, drug screens, parenting classes, a domestic violence assessment and a domestic violence class, and mental health services such as a psychological assessment, psychiatric services, and counseling. Respondent also was afforded parenting time with the child, but she did not take advantage of this opportunity for the last eight months of the proceedings because of her continued positive drug screen results. The caseworker testified that she initiated and attempted to maintain contact with respondent throughout the proceedings. In conformity with MCL 712A.19(6) and (7) and MCL 712A.19a(3), the circuit court throughout the proceedings evaluated respondent's compliance with her treatment plan and her progress toward rectifying her issues, and the court repeatedly encouraged respondent during the proceedings to follow through with services. In conclusion, our review of the record confirms that respondent received proper notice of the proceedings and "a meaningful opportunity to participate." *In re Rood*, 483 Mich at 122.

Notwithstanding these efforts, respondent failed to make or maintain significant or sustained progress with respect to substance abuse or mental health treatment, she remained incarcerated for a significant period of the proceedings because of arrests stemming from illegal drug use and probation violations, and she lost the housing that petitioner had helped her obtain. And despite the court's suspension of respondent's parenting time in January 2009 after a positive drug screen, over the next eight months before the termination hearing she could not string together three negative drug screens to earn a reinstatement of her parenting time. Respondent's inability to benefit from services simply does not owe to any lack of effort on the part of petitioner or the court. Moreover, no reasonable likelihood existed that respondent might rectify her housing, mental health and substance abuse issues within a reasonable time to give the child a safe and stable environment, especially considering his very young age and that he had already spent almost a third of his life in foster care.[5] We detect no clear error in the circuit

[4] Respondent appeared at all but one of the hearings and had representation by appointed counsel at all the hearings. *In re Rood*, 483 Mich at 94.

[5] We reject respondent's claim that the circuit court did not afford her enough time to demonstrate progress after the court had appointed a substitute attorney to represent her. Even with the benefit of a new attorney, whom the circuit court appointed in April 2009, respondent displayed no hint of any improvement in her progress over the last four to six months of the proceedings. To the contrary, during the last four to six months respondent continued to use illegal drugs, was arrested and incarcerated for possessing heroin and crack cocaine, violated her probation, and lost her apartment. Respondent used heroin as recently as one month before the continued termination hearing.

court's findings that clear and convincing evidence warranted termination of respondent's parental rights under MCL 712A.19b(3)(c)(*i*) and (g).[6] *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

Respondent further submits that her appointed counsel was ineffective. Because respondent did not seek a new trial or an evidentiary hearing on grounds that her counsel provided ineffective assistance, we limit our review to mistakes apparent on the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). We evaluate ineffective assistance claims in the child welfare context by applying the same test applicable in criminal matters. *In re Rogers*, 160 Mich App 500, 502; 409 NW2d 486 (1987).

> A defendant that claims he has been denied the effective assistance of counsel must establish (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different. [*Sabin*, 242 Mich App at 659 (citations omitted).]

The party alleging ineffective assistance bears the burden to produce factual support for the claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Respondent has not demonstrated that the result of the proceedings would have differed had her counsel objected to respondent's allegedly defective plea or to the court's purported disregard of the ICWA. Furthermore, respondent points to no factual support for her contentions that her substitute counsel was ineffective because counsel could not meet with respondent until the day of the termination hearing, or her suggestion that the court thwarted her substitute counsel's effectiveness by not extending respondent enough time to complete her parent-agency agreement. *Hoag*, 460 Mich at 6. Our review of the record reveals nothing to suggest that respondent's substitute counsel lacked familiarity with the case or engaged in any unreasonable professional conduct that might have affected the outcome of the proceeding. To the contrary, respondent's substitute counsel plainly had awareness of the pertinent issues and vigorously addressed them at the termination hearing.

Respondent lastly disputes the circuit court's finding that termination served the child's best interests. MCL 712A.19b(5). We review for clear error the court's best interest determination. *In re Trejo*, 462 Mich at 356-357. We conclude that the circuit court properly found that termination of respondent's parental rights served the child's best interests, in light of (1) respondent's inability to make any significant progress toward addressing her issues during the year before the termination hearing, (2) the absence of visits or bonding between respondent and the child for the eight months preceding the termination hearing, (3) the child's young age

[6] Given the existence of multiple grounds supporting termination, we need not consider the circuit court's reliance on MCL 712A.19b(3)(j).

and the substantial length of time he had already spent in foster care, and (4) the child's contentment and well being in his relative placement. Although respondent voiced her desire to rectify her substance abuse issue and care for the child, her conduct during the majority of the proceedings indicated otherwise, and it remained wholly uncertain when and if she might make substantial progress toward addressing her substance abuse difficulties and other impediments to proper parenting.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher