STATE OF MICHIGAN

COURT OF APPEALS

In re MEDWAYOSH, Minor.

UNPUBLISHED
August 26, 2021

No. 355856
Delta Circuit Court
Family Division
LC No. 20-000552-NA

Before: RONAYNE KRAUSE, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

Respondent-mother appeals as of right an order terminating her parental rights to a minor child, JM, under MCL 712A.19b(3)(i) and (j).[1] Respondent-mother had had her parental rights to three other children terminated in the past and had voluntarily relinquished her parental rights to another child after the initiation of child-protective proceedings. JM was her fifth child. At the time of termination, respondent-mother was incarcerated and awaiting sentencing on felony drug charges. Respondent-mother takes issue with the trial court's finding of probable cause in support

[1] These subparagraphs authorize termination if:

> (i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and the parent has failed to rectify the conditions that led to the prior termination of parental rights.
>
> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent. [MCL 712a.19b(3).]

of the petition for jurisdiction[2] and also takes issue with an aspect of the plea proceedings.[3] We affirm.

I. INITIAL PROCEEDINGS

Respondent-mother contends that the trial court erred by finding probable cause for the authorization of the petition and by putting JM into foster care[4] because the court's concern should have been for the well-being of JM, and JM, at the time of the preliminary hearing, was being properly cared for by a married couple at respondent-mother's request. Respondent-mother contends that the court became involved in child-protective proceedings when the case, instead, should have proceeded to a voluntary adoption by this couple. She points out that she had signed a delegation of parental authority (DOPA) for the couple under MCL 700.5103.[5]

This Court reviews a trial court's findings in a termination case for clear error. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). "A finding is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the firm and definite conviction that a mistake has been made." *Id*. (quotation omitted).

MCR 3.965(B) states, in part:

> (12) Unless the preliminary hearing is adjourned, the court must decide whether to authorize the filing of the petition and, if authorized, whether the child should remain in the home, be returned home, or be placed in foster care pending trial. *The court may authorize the filing of the petition upon a showing of probable cause, unless waived, that one or more of the allegations in the petition are true and fall within MCL 712A.2(b).* The Michigan Rules of Evidence do not apply,

[2] Petitioner sought termination in the initial petition.

[3] Respondent-mother acquiesced to the court's assumption of jurisdiction and to the termination of her parental rights.

[4] Respondent-mother is arguing that the trial court committed one overarching error by authorizing the petition and putting JM into foster care. In other words, she is not making two separate arguments—one about the placement of JM into foster care and one about probable cause to authorize the petition.

[5] MCL 700.5103 states, in part:

> (1) By a properly executed power of attorney, a parent or guardian of a minor or a guardian of a legally incapacitated individual may delegate to another person, for a period not exceeding 180 days, any of the parent's or guardian's powers regarding care, custody, or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward or to release of a minor ward for adoption.

other than those with respect to privileges, except to the extent that such privileges are abrogated by MCL 722.631.

(13) If the court authorizes the filing of the petition, the court:

(a) may release the child to a parent, guardian, or legal custodian and may order such reasonable terms and conditions believed necessary to protect the physical health or mental well-being of the child; or

(b) may order placement of the child after making the determinations specified in subrule (C),[6] if those determinations have not previously been made. If the child is an Indian child,[7] the child must be placed in descending order of preference with:

(*i*) a member of the child's extended family,

(*ii*) a foster home licensed, approved, or specified by the child's tribe,

(*iii*) an Indian foster family licensed or approved by the department,

(*iv*) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

The court may order another placement for good cause shown in accordance with MCL 712B.23(3)-(5). If the Indian child's tribe has established a different order of preference than the order prescribed above, placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in MCL 712B.23(6). The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties. [Emphasis added.]

MCL 712A.2(b) states, in part, that a court has jurisdiction:

in proceedings concerning a juvenile under 18 years of age found within the county:

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in. As used in this

[6] This subrule deals with, among other things, whether the child would be at risk with the parent and whether reasonable efforts to avoid removal were expended. MCR 3.965(C).

[7] JM is an Indian child. The couple who had been caring for JM are not Native American.

> sub-subdivision, "neglect" means that term as defined in section 2 of the child abuse and neglect prevention act, 1982 PA 250, MCL 722.602.[8]

A worker with petitioner, the Department of Health and Human Services (DHHS), reported that the terminations with regard to respondent-mother's older children "were . . . a result of chronic drug use, domestic violence,[9] [and an] inability to maintain any housing or employment for the best interests of the kids." She reported that respondent-mother "worked a case—that . . . was open for approximately two years." She testified that custody of JM with respondent-mother was not appropriate at the present time, stating:

> [Respondent-mother] worked a lengthy case plan with the tribe to reunify with her kids. She was unable to reunify. She struggles with severe substance abuse issues, mental health issues, unhealthy relationships. She's not able to provide a safe environment for her kids, and she's currently incarcerated on felony drug charges [regarding possession of methamphetamine].

The worker recited a plethora of services that had been offered to respondent-mother in the past.

An expert witness testified on behalf of the Sault Ste. Marie Tribe of Chippewa Indians and stated that JM "would be at serious risk of harm, emotional and physical harm, if he were to remain in [respondent-mother's] care." She stated that the Sault Tribe was working to find a tribal placement for JM, and one was later found. The expert clarified that because of the removal petition, and because there was an immediate risk of harm to the child, if the child was removed, the Tribe would require placement with either a relative or a licensed foster home. In the event of a direct adoption proceeding, placement would be a question for the Tribe's child welfare committee. She stated that nothing was known about the home of the couple sought out by respondent-mother, and she did not think any adoption petitions had been filed by them. The

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[8] Petitioner relied on MCL 712A.2(b)(2) in seeking jurisdiction.

[9] Our review of the 2019 Sault Ste. Marie Chippewa Tribal Court opinion and order terminating respondent's parental rights reflects that termination was actually based on respondent's inability to maintain sobriety, exposure to the children of dangerous drugs and potentially-dangerous individuals, and inability to maintain a stable and safe environment. Indeed, the Indian Child Welfare Act expert witness opined that the prior terminations had been "due to continued drug use and failure to make progress in a service plan." The tribal court did note in its best interests determination, among other things, that respondent had been a victim of domestic violence. This is an impermissible basis for terminating parental rights. *In re Plump*, 294 Mich App 270, 273; 817 NW2d 119 (2011). However, it is clear that the tribal court was ultimately concerned with the intolerable instability of the environment respondent provided for the children and her inability to meet the children's emotional needs. The tribal court's limited reliance on respondent's victimization appears to have been for the purpose of noting that respondent's abusive partner repeatedly used one of the children "as a pawn," to that child's great detriment. It is not improper to consider a parent's failure to protect a child from abuse.

couple testified that they had no criminal history, but they were not related to respondent or Tribe members, and they had not yet filed for adoption.

In light of this evidence, the trial court did not clearly err by finding probable cause that respondent-mother's home was unfit for JM because of depravity or criminality. MCL 712A.2(b)(2). Respondent-mother provides no authority on appeal for her argument that the signing of the DOPA countered the unfitness of her home such that probable cause was lacking. In fact, respondent-mother cites no authorities at all in support of her issue I on appeal. As stated in *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), "a mere statement without authority is insufficient to bring an issue before this Court. It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." (Citation and quotation marks omitted.)

In any event, the DOPA was a temporary document, MCL 700.5103, and therefore did not provide for JM's long-term safety, see *In re Martin*, 237 Mich App 253, 256-258; 602 NW2d 630 (1999). Rather, JM was still effectively under respondent's parental authority. The trial court specifically stated that the couple appeared proper, but under the Indian Child Welfare Act (ICWA), it was not empowered to make a placement determination and had no choice but to refer placement to the agency. The trial court did not commit clear error in finding that removal of JM was proper or by following the law.

II. PLEA PROCEEDINGS

November 20, 2020, was the date set for a bench trial. Respondent-mother's attorney stated that he and his client intended to sign a stipulated set of facts (SSF). He stated:

> We just finalized it with my client . . . We do intend to authorize it or approve it. The [c]ourt, with my permission, and same with my client, she will admit today, and she understands her rights will be terminated . . . So we're all set with that; we're not contesting.

Respondent-mother and her attorney agreed to let the court sign the SSF on their behalf in light of the remote proceedings that were occurring because of the COVID-19 pandemic.

The SSF indicated that respondent-mother had pleaded guilty to drug charges; was scheduled to be sentenced on November 23, 2020; and had a sentence recommendation of 3 to 20 years' imprisonment. The SSF set forth the four prior terminations and stated that they were based, in part, on "continued substance abuse and criminality." It then stated, in part:

> 5. The reason for the termination of the Respondent Mother's Parental [sic] rights to her older children in part was because of continued substance abuse and criminality by the Respondent Mother.[10]

[10] Domestic violence was not mentioned. See footnote 9.

6. The parties agree beyond a reasonable doubt that the parental rights to 1 or more siblings of [JM] have been terminated due to serious and chronic neglect or physical or sexual abuse, and the parent has failed to rectify the conditions that led to the prior termination of parental rights under MCL § 712A.19b(3)(i).

7. The parties agree beyond a reasonable doubt that there is [a] reasonable likelihood, based on the conduct or capacity of the Respondent Mother, that [JM] will be harmed if he is returned to the home of the Respondent Mother under MCL § 712A.19b(3)(j).

8. There is little parental bond between the Respondent Mother and [JM], due to the Respondent Mother's incarceration.

9. [JM] is currently placed with a licensed, non-relative Indian Foster family.

10. The permanency goal for [JM] is adoption, [JM] is adoptable and the Foster Family is willing to adopt.

11. [JM] is in need of permanency, stability, and finality, and the Respondent Mother cannot provide it. [JM's] foster family can.

12. The following active efforts have been made to prevent removal and termination of the Respondent Mother's parental rights: [list of 39 items omitted]

13. The court should find by a preponderance of the evidence that it is in the best interest of [JM] for the Respondent Mother's parental rights to be terminated. [Emphases removed.]

The court stated that it would "be in agreement to take a no contest plea," because respondent-mother was awaiting sentencing in her criminal case. Respondent-mother and respondent-mother's attorney agreed. Respondent-mother's attorney stated that he was entering a no-contest plea on behalf of respondent-mother. The court explained various rights to respondent-mother and stated:

A no contest plea would be used in regards to terminating your parental rights to this child. Because the original petition does seek to terminate your parental rights to this child.

Because termination is sought at the initial dispositional hearing in this matter, there would not be a case services plan or parent agency treatment plan that would be put in place.

Respondent-mother stated that she understood "all of [her] rights" and that she had no questions. She denied that she had been threatened or coerced into making the plea or that any promises had been made to her in exchange for the plea. She affirmed that she was making the plea of her "own free will."

The court accepted the plea to jurisdiction, stating that "[t]he same criminality and drug abuse that was present regarding termination of those four previous children are still present today." The court stated that respondent-mother "has not rectified any of the conditions which led to termination of the other four children," adding, "[i]n fact, she's incarcerated at this time and is facing substantial prison time."

The court stated that, now that it had established jurisdiction, it would move to the statutory grounds for termination. It asked if the parties wished to rely on the SSF for purposes of the statutory grounds for termination. Respondent-mother's attorney stated, "That's fine." The court stated:

> I'll simply ask the respondent mother: You have indicated you are in agreement with the stipulated set of facts for the statutory grounds. The [c]ourt would go forward with the statutory grounds based on those stipulated . . . facts.
>
> Mom, are you in agreement with that?

Respondent-mother answered, "Yes." The court referred to the SSF and stated that grounds for termination under MCL 712A.19b(3)(i) and (j) had been established beyond a reasonable doubt and also found that termination was in JM's best interests. JM's guardian ad litem contended that respondent-mother was "doing the right thing here and voluntarily and not contesting to terminate [sic] her parental rights." He stated, "We have a situation where there is little to no bond with her son. She's awaiting a lengthy prison sentence, and he's bonded with his foster care placement." The court asked respondent-mother why she thought it was in JM's best interests for her parental rights to be terminated, and she replied, "Because I'm incarcerated and looking at prison time."

On appeal, respondent-mother alleges that the trial court violated MCR 3.971(D)(2), which states:

> 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.]

Respondent-mother contends that use of the SSF was the equivalent of asking questions, that DHHS could have established the facts in the SSF by other means, and that the SSF increased respondent-mother's exposure to the criminal-justice system because she was awaiting sentencing on drug charges and made incriminating statements by way of the SSF. She contends that the plea was, in practical effect, a "guilty" plea, and that this Court should rule that her plea was involuntary because she thought she was agreeing to a no-contest plea.

However, "[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008) (quotation marks and citations omitted). "A party cannot stipulate a matter and then argue on appeal that the resultant action was

error." *Id*. at 588 (quotation marks and citation omitted). As detailed, respondent-mother freely acquiesced to the use of the SSF. Accordingly, respondent-mother has waived the present argument that the trial court improperly relied upon the SSF.

Moreover, there was no indication whatsoever of involuntariness. To the extent we are able to comprehend respondent-mother's argument on appeal, it appears to be that a "guilty" plea would impact her then-pending criminal case. It is true that a plea of no contest does not constitute an admission in the same manner as a plea of guilty. See *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 512; 679 NW2d 106 (2004). Guilty pleas also traditionally "carry a greater stigma" than no-contest pleas. See *People v Hill*, 86 Mich App 706, 714; 273 NW2d 532 (1978). However, respondent-mother has provided no indication that her plea did actually affect her criminal case. Furthermore, the use of a conviction in subsequent proceedings does not depend on whether the conviction resulted from a plea of guilty, a plea of no contest, or a trial. *Shuler*, 260 Mich App at 511-512. Because respondent-mother has not articulated how she suffered any non-speculative harm, we are unable to find plain error. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

Affirmed.

/s/ Amy Ronayne Krause
/s/ Jane M. Beckering
/s/ Mark T. Boonstra