

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
November 29, 2011

In the Matter of CUNNINGHAM/JONES, Minors.

No. 303682
Macomb Circuit Court
Family Division
LC No. 2009-000527-NA
2009-000528-NA
2009-000529-NA

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Respondent appeals the trial court's order that terminated her parental rights to the minor children under MCL 712A.19b(3)(c)(i), (g), and (j). For the reasons set forth below, we affirm.

The trial court took jurisdiction over respondent's three minor children based on allegations against respondent that included physical, emotional, and financial neglect. Respondent was residing with a convicted sex offender and was not providing the basic necessities for her children. During the termination hearing on the supplemental petition for termination of respondent's parental rights, respondent gave a plea of admission to the statutory allegations and regarding the best interests of the children.

The trial court did not clearly err in ruling that the statutory grounds for termination were established by clear and convincing evidence, based on respondent's plea and extensive evidence admitted by judicial notice during the termination hearing. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010); *In re Rood*, 483 Mich 73, 90-91, 126 n 1; 763 NW2d 587 (2009). The court also did not clearly err in finding that termination of respondent's parental rights was in the children's best interests. MCL 712A.19b(5). Clear error exists "if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

Respondent contends that her plea should be set aside and that this Court should remand her case for a continuation of the termination hearing. Because respondent did not preserve this issue by raising it in an appropriate motion in the lower court, *In re Zelzack*, 180 Mich App 117, 126; 446 NW2d 588 (1989), this Court's review is for plain error that affected substantial rights.

People v Carines, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *In re Egbert R Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007).

Respondent takes the position that the trial court did not comply with MCR 3.971(C)(2) and that it should not have accepted her plea to the supplemental petition to terminate her parental rights. During the termination hearing on the supplemental petition, respondent effectively consented to termination of her parental rights by offering a plea of admission, stating that she was unable to provide a safe, stable, nonneglectful home environment for her minor children, and she would be unable to do so within a reasonable amount of time. Respondent also admitted that there is a reasonable chance that the children would be harmed if returned to her care. Further, respondent stated that termination of her parental rights was in the children's best interests. However, the court did not make factual findings on the record in support of the statutory allegations as provided in MCR 3.971(C)(2).

The court rules governing child protective proceedings permit a respondent to enter a plea to an original or amended petition, but not to a supplemental petition. MCR 3.971(A); MCR 3.977. MCR 3.971 applies to pleas for court jurisdiction, not to supplemental petitions for termination of parental rights as evidenced by the rule's terms. MCR 3.971(B)(4) states that the court must advise the respondent "of the consequences of the plea, *including that the plea can later be used as evidence in a proceeding to terminate parental rights* if the respondent is a parent." MCR 3.971(B)(4) (emphasis added). Thus, strict compliance with the rule is not possible during a termination hearing.

To support her contention that MCR 3.971 requires a court to make factual findings to support a plea of admission given during a termination hearing, respondent relies solely on an unpublished opinion — *In re JM Tolliver*, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2010 (Docket No. 295984). An unpublished decision is not binding precedent. MCR 7.215(C)(1). Furthermore, *Tolliver* is not persuasive. Unlike here, the trial court in *Tolliver* accepted a respondent's plea of admission to the allegations in a supplemental petition before the termination hearing. The *Tolliver* Court, citing MCR 3.971(B)(4), emphasized that a plea could be used later as evidence in a termination proceeding. The issue was not whether the trial court failed to make factual findings to support the plea.

Here, the trial court did not err in accepting respondent's plea of admission to the allegations in the supplemental petition during the termination hearing. Respondent's plea was knowingly, understandingly, and voluntarily given. The court, mindful of its obligation to meet essential requirements of due process and fair treatment, tailored the court rules to accept a plea during the termination hearing, apparently using MCR 3.971(B) as a template. Generally, court rules governing child protection proceedings "are to be construed to secure fairness, flexibility, and simplicity. The court shall proceed in a manner that safeguards the rights and proper interests of the parties." MCR 3.902(A). It is undisputed that the trial court properly advised respondent of her rights at the time she offered her plea of admission. The court advised, and respondent acknowledged on the record, that she understood the allegations in the supplemental petition. Additionally, the court clearly explained and respondent understood that she was entitled to continue with the termination hearing and that petitioner had to prove its case by clear and convincing evidence to terminate her parental rights. Further, respondent understood that, by giving the plea, the proceedings would end. Respondent was plainly advised and understood

that she was giving up all parental rights to her children by entering a plea of admission. Thus, the plea was knowingly executed. A review of the transcript also shows that respondent acknowledged on the record that she offered the plea willingly and was not induced by any threats or promises, and that she wanted to release her parental rights. Thus, the plea was also voluntarily executed.

Further, there is nothing in the record to show that respondent's ability to make an informed and voluntary decision was impaired. Respondent makes a cursory remark on appeal about her cognitive limitations. However, the record does not establish that respondent's mental condition was such that she was unable to understand the nature and object of the proceedings, and her statements to the court, including her testimony that she had just completed schooling to become a medical assistant, showed a satisfactory level of comprehension. Respondent responded appropriately to the court's questions and there was no indication that she was unable to understand the proceedings. Also, respondent was represented by counsel throughout the proceedings and there is no claim that she received ineffective representation. Moreover, respondent's attorney, petitioner's attorney, and the GAL stated on the record that they were satisfied with the plea, and respondent's attorney declined the trial court's offer for her to voir dire her client. For these reasons, there was no error in the offering or acceptance of respondent's plea.

Although respondent contends that her plea should be withdrawn and the termination hearing continued, there is no absolute right to withdraw a plea once it is accepted. *People v Hale*, 99 Mich App 177, 180; 297 NW2d 609 (1980). When a respondent knowingly and voluntarily releases his or her parental rights, a change of heart alone is not sufficient to set aside the termination. *In re Burns*, 236 Mich App 291, 292-293; 599 NW2d 783 (1999); *In re Curran*, 196 Mich App 380, 385; 493 NW2d 454 (1992). Here, as discussed, respondent knowingly and voluntarily rendered a plea of admission. The record does not reveal any reason for withdrawing the plea other than that respondent simply changed her mind, having decided after the court accepted her plea that she was capable of raising her children and wanted an opportunity to do so. Further, respondent's attempt to withdraw her plea is untimely. A respondent must raise issues concerning a court's noncompliance with court rules governing pleas before appeal. *In re Zelzack*, 180 Mich App at 125. Respondent did not seek redress with the trial court before raising the procedural defect issue on appeal. The trial court's failure to making factual findings in support of the plea did not affect the fundamental fairness and integrity of the proceedings. *In re Williams*, 286 Mich App 253, 273-274; 779 NW2d 286 (2009). We find no error requiring reversal under the circumstances presented. MCR 3.902(A); MCR 2.613(A).

Respondent also argues that, had the court made factual findings to support the plea, consistent with MCR 3.971(C)(2), she may have chosen to withdraw her plea. Respondent contends that she might have realized that she had substantially complied with the treatment plan or that petitioner did not make reasonable reunification efforts and her parental rights would not have been terminated. This argument is highly speculative and not consistent with the trial court record. Extensive evidence was made part of the termination hearing record by judicial notice. There is ample evidence that petitioner made reasonable reunification efforts and that respondent failed to meet all goals of her treatment plan except being free of substance abuse. Despite the services offered to her, respondent lacked suitable housing and financial stability. Most

troubling was the fact, supported by ample credible evidence, that respondent continued in a relationship with Jackson, a known convicted sex offender whose parole terms mandated that he have no contact with children under the age of 17. The trial court had ordered that respondent and her children have no contact with Jackson, and respondent stated repeatedly, under oath, at review hearings and the termination hearing, that there was no contact since the court assumed jurisdiction over the children. Yet, at the termination hearing, Jackson's parole officer testified that she saw respondent with Jackson on numerous occasions in 2010 and GPS tether documentation showed Jackson at respondent's residence multiple times in early 2011. Respondent offered a plea of admission shortly after the parole officer's testimony concluded. Clearly, respondent did not benefit despite more than 17 months of services. Respondent showed a profound lack of parental judgment by remaining with Jackson and she placed her own needs above the safety of her young children.

Independent of respondent's plea, there was ample evidence that respondent could not provide her children with a safe and suitable home. Affirming the trial court's order for terminating respondent's parental rights, based on the proper plea of admission given during the termination hearing, is consistent with substantial justice. MCR 2.613(A); MCR 3.902(A).

Affirmed.

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Peter D. O'Connell