

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
December 13, 2011

In the Matter of MORGAN, Minors.

No. 304625
Eaton Circuit Court
Family Division
LC No. 09-017246-NA

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

M. Morgan appeals as of right an order terminating his parental rights to his minor children.¹ We affirm.

Termination of Morgan’s parental rights was sought primarily because he had repeatedly sexually abused his oldest child. At the termination hearing, the child was not called to testify regarding the sexual abuse. Instead a certified copy of Morgan’s judgment of sentence in his related criminal proceeding was presented, which showed that Morgan had been convicted of three counts of first-degree criminal sexual conduct and was sentenced to 108 to 180 months in prison for the convictions. Morgan argues that this procedure violated his due process right to confront the witnesses against him and have the petitioner prove the statutory grounds for termination by clear and convincing legally admissible evidence. We disagree.

Morgan did not raise a due process issue in the trial court, leaving the issue unpreserved.² Accordingly, “review is limited to determining whether a plain error occurred that affected substantial rights.”³

¹ MCL 712A.19b(3)(b)(i) [the child “has suffered physical injury or physical or sexual abuse” caused by the parent’s act and “the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent’s home”] and (k)(ii) [“[t]he parent abused the child” and the abuse included “[c]riminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate”].

² *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

³ *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), aff’d 480 Mich 19 (2008).

When termination is sought at an initial dispositional hearing, the statutory grounds for termination must be proven by legally admissible evidence.⁴ The statutory grounds for termination must also be proven by legally admissible evidence where, as here, the respondent was not subject to an adjudication.⁵ “[P]arents have a significant interest in the companionship, care, custody, and management of their children. This interest has been characterized as an element of ‘liberty’ to be protected by due process.”⁶ The concept of due process is flexible, and analysis of what process is due in a particular proceeding depends on the nature of the proceeding, the risks involved, and the private and governmental interests that might be affected.⁷ “The essence of due process is fundamental fairness.”⁸ Procedural due process requires that a party be provided notice of the nature of the proceeding and an opportunity to be heard by an impartial decision maker at a meaningful time and in a meaningful manner.⁹ The opportunity to be heard requires a hearing at which a party may know and respond to the evidence.¹⁰

The trial court held a hearing on the termination petition. Morgan does not dispute that he had notice of the nature of the proceeding. Morgan was represented by counsel at the hearing. He does not contend that the certified record of his conviction was not legally admissible evidence entitled to consideration at the hearing. Because Morgan’s criminal conviction was not final, as an appeal was pending, it could have been collaterally attacked at the termination hearing.¹¹ Morgan, however, declined to testify and waived all witnesses he planned to call. Although the victim of the alleged sexual abuse did not testify at the termination hearing, the right to confront witnesses against one is a right guaranteed to the accused in a criminal proceeding¹² and does not apply to civil proceedings,¹³ including child protective proceedings brought under the Juvenile Code.¹⁴ As such, Morgan has failed to establish any plain error relating to his right to due process or his right to confront witnesses.

⁴ MCR 3.977(E)(3).

⁵ *In re CR*, 250 Mich App 185, 205-206; 646 NW2d 506 (2002).

⁶ *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993).

⁷ *Id.* at 111.

⁸ *In re Adams Estate*, 257 Mich App 230, 233-234; 667 NW2d 904 (2003) (internal quotations and citation omitted).

⁹ *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005).

¹⁰ *Hanlon v Civil Serv Comm*, 253 Mich App 710, 723; 660 NW2d 74 (2002).

¹¹ See *SS Aircraft Co v Piper Aircraft Corp*, 159 Mich App 389, 393; 406 NW2d 304 (1987).

¹² US Const, Am VI; Const 1963, art 1, § 20.

¹³ *Hinky Dinky Supermarket, Inc v Dep’t of Community Health*, 261 Mich App 604, 607; 683 NW2d 759 (2004).

¹⁴ *In re Brock*, 442 Mich at 107-108.

Morgan also argues that his due process rights were violated when the trial court took judicial notice of his criminal conviction as a basis for terminating his parental rights. Morgan contends that this deprived him of his right to appellate review of the basis for terminating his parental rights. We disagree.

The trial court held a hearing at which DHS was required to prove the statutory grounds for terminating Morgan's parental rights by clear and convincing legally admissible evidence.¹⁵ The court did not take judicial notice of Morgan's criminal convictions. Rather, DHS proved that Morgan had been convicted of first-degree criminal sexual conduct involving his daughter by the testimony of foster care worker, Jessica Riley, and by offering a certified copy of Morgan's judgment of sentence. Morgan did not contend in the trial court, and does not argue on appeal, that such evidence was not legally admissible. Additionally, Morgan failed to collaterally attack his conviction at the termination hearing to show that the allegations of sexual abuse were unfounded, which he was entitled to do.¹⁶ For these reasons, there was no plain error regarding Morgan's due process rights and his right to appellate review of the termination decision was not affected.

Morgan does not otherwise challenge the evidence regarding the statutory grounds for termination. He argues only that the trial court erred in finding that termination of his parental rights was in the children's best interests.¹⁷ We disagree. The trial court's decision regarding a child's best interests is reviewed for clear error.¹⁸

Although the best interest factors set forth in the Child Custody Act¹⁹ do not apply to child protective proceedings²⁰ a court may consider them to the extent that they are relevant in a child protective proceeding.²¹ The evidence showed that Morgan and his wife had physically or sexually abused two of their children, who were afraid of Morgan. Three of the children were severely traumatized by their upbringing and were still in therapy to address that trauma. The fourth child apparently escaped severe emotional harm only because he was too young to know what was going on. All of the children significantly improved emotionally and behaviorally after being placed in a secure and stable environment. The children did not demonstrate a significant emotional attachment to Morgan. They required continued stability and permanence to enhance their future growth and development, which Morgan could not provide. As such, the

¹⁵ *In re CR*, 250 Mich App at 205-206.

¹⁶ *SS Aircraft Co*, 159 Mich App at 393.

¹⁷ MCL 712A.19b(5).

¹⁸ MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

¹⁹ MCL 722.23.

²⁰ *In re Schejbal*, 131 Mich App 833, 835; 346 NW2d 597 (1984); *In re Atkins*, 112 Mich App 528, 540-541; 316 NW2d 477 (1982).

²¹ *In re JS & SM*, 231 Mich App 92, 102-103; 585 NW2d 326 (1998), overruled in part on other grounds by *In re Trejo Minors*, 462 Mich at 353.

trial court did not clearly err in finding that termination of Morgan's parental rights was in the children's best interests.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto