STATE OF MICHIGAN

COURT OF APPEALS

	UNPUBLISHED May 3, 2012
In the Matter of MCCORMACK, Minors.	No. 306392 Kalamazoo Circuit Court Family Division LC No. 2009-000271-NA
In the Matter of H. N. MCCORMACK, Minor.	No. 306393 Kalamazoo Circuit Court Family Division LC No. 2009-000273-NA

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

In these consolidated appeals, respondent R. McCormack ("respondent") appeals as of right from the trial court's decision and order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). The order was entered in each of two separate cases that were consolidated below—one involving respondent's two children from a relationship with respondent M. McCormack, and the other involving an older child from a prior relationship with respondent A. Price.[1] For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEEDINGS

Respondent is the father of the three minor children involved in these appeals. The trial court acquired jurisdiction over the two youngest children pursuant to a plea of admission by their mother, respondent M. McCormack. Jurisdiction over the oldest child was acquired later, pursuant to a no contest plea by respondent. Respondent participated in services, but petitioner filed a supplemental petition to terminate respondent's parental rights in each case after

[1] The trial court also terminated the parental rights of M. McCormack and A. Price to their respective children, but they are not parties to this appeal.

respondent failed to benefit from services. The trial court consolidated the two cases for purposes of the termination hearing.

II. CONSOLIDATION

Respondent first argues that he was prejudiced by the trial court's decision to consolidate the two proceedings for purposes of a termination hearing. There is no indication that respondent objected to the trial court's consolidation of the two cases. When the trial court announced at the beginning of the hearing that it intended to "conduct the hearings contemporaneously for all three children," respondent did not object to that procedure, but instead merely objected to the trial court's consideration of a psychological evaluation in the case involving the older child. Accordingly, because there was no objection to the trial court's decision to consolidate the two cases for purposes of a termination hearing, this issue is not preserved. Therefore, this Court's review is limited to plain error affecting respondent's substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

Subchapter 3.900 of the Michigan Court Rules governs proceedings involving juveniles. MCR 3.901(A)(1) provides that the rules in subchapter 3.900, in subchapter 1.100, and in MCR 5.113 govern practice and procedure in the family division of circuit court in all cases filed under the Juvenile Code. MCR 3.901(A)(2) provides that "[o]ther Michigan Court Rules apply to juvenile cases in the family division of the circuit court only when this subchapter specifically provides." The court rules do not contain a specific rule governing consolidation of child protective proceedings. In the absence of any authority specifically prohibiting consolidation of child protective proceedings, we decline to find plain error with respect to the trial court's authority to consolidate the two proceedings in this case. Indeed, respondent does not contend that the trial court lacked the inherent authority to consolidate related child protection proceedings. Instead, he argues that under the circumstances of this case, consolidation violated his right to due process.

"Due process requires fundamental fairness." *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009). "A procedural due process analysis requires a dual inquiry: (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient." *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 605–606; 683 NW2d 759 (2004), quoting *Jordan v Jarvis*, 200 Mich App 445, 448; 505 NW2d 279 (1993). With respect to the first inquiry, it is undisputed that parents have a fundamental liberty interest in the care, custody, and management of their children. *Rood*, 483 Mich at 76. With respect to the second inquiry, constitutionally sufficient procedures "generally require[ ] notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995).

In this case, respondent does not contend that he did not receive notice of the proceedings or an opportunity to be heard. Indeed, respondent was afforded a hearing on the supplemental petitions to terminate his parental rights, and he was present at the hearing and allowed to participate. Further, respondent does not contend that the trial court was biased against him. Instead, the crux of respondent's due process claim is that the two proceedings were subject to different evidentiary standards, which created the potential for confusion between the two cases.

As previously indicated, respondent was not subject to the adjudication in the case involving the two younger children, but he was subject to the adjudication in the case involving his older child. At a termination hearing, different evidentiary standards apply, depending on whether the parent was previously subject to the adjudication. See MCR 3.977(F) and (H). As explained in *In re CR*, 250 Mich App 185, 205-206; 646 NW2d 506 (2002):

> The parent who has been subject to an adjudication . . . can have [his] parental rights terminated on the basis of all the relevant and material evidence on the record, including evidence that is not legally admissible. In contrast, the petitioner must provide legally admissible evidence in order to terminate the rights of the parent who was not subject to an adjudication[.]

Thus, because respondent was subject to the adjudication in the case involving his older child, but was not subject to the adjudication in the case involving his two younger children, different evidentiary standards applied.

However, we are not persuaded that the mere fact that the two proceedings were subject to different evidentiary standards, affected respondent's right to due process. Respondent relies merely on the potential for confusion to support his due process argument. However, respondent does not cite any examples in the record in which this alleged potential for confusion actually materialized. Although legally admissible evidence was required in the case involving respondent's two younger children, a restriction that did not apply in the case involving respondent's older child, respondent does not identify any instance in which petitioner relied on evidence that was not legally admissible to support termination of his parental rights to the two younger children. Accordingly, respondent has not satisfied his burden of demonstrating a plain error, nor has he shown that his substantial rights were actually affected by the consolidation of the two proceedings.

Respondent also argues that he was prejudiced by the trial court's consolidation decision because evidence of Dr. Haugen's psychological evaluation was admissible only in the case involving respondent's two younger children, inasmuch as respondent waived the therapist-patient privilege only in that case.

Respondent does not dispute that he waived the therapist-patient privilege in the case involving his two younger children, but contends that the waiver did not extend to the case involving his older child. Respondent relies on MCL 722.631, MCL 333.18237, and MCL 330.1750(2).

MCL 722.631 provides, in pertinent part:

> Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication *is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to this act.* [Emphasis added.]

MCL 333.18237 provides:

> A psychologist licensed or allowed to use that title under this part or an individual under his or her supervision cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services. *Information may be disclosed with the consent of the individual consulting the psychologist*, or if the individual consulting the psychologist is a minor, with the consent of the minor's guardian, pursuant to section 16222 if the psychologist reasonably believes it is necessary to disclose the information to comply with section 16222, or under section 16281. . . . [Emphasis added.]

MCL 722.631 provides that the therapist-client privilege is abrogated with respect to a report and related evidence "made pursuant to this act" (i.e., the Child Protection Law), MCL 722.621 *et seq*. It does not make any provision for a situation in which a respondent is the parent of more than one child under the court's jurisdiction, and in which separate cases have been filed for the children. However, MCL 333.18237, which pertains to confidentiality for licensed psychologists, generally provides that an individual's consent to disclosure of otherwise privileged communications permits the psychologist to disclose information received from the patient. MCL 330.1750(2)(b) provides an exception for the privilege if the privileged communication is "relevant to a matter under consideration in a proceeding governed by this act," i.e., the mental health code, and "the patient was informed that any communications could be used in the proceeding." MCL 333.18237 provides for a broad, general waiver of the privilege that authorized the trial court to consider Dr. Haugen's testimony in both cases.

Furthermore, even if it was improper to consider Dr. Haugen's psychological evaluation in the case involving respondent's older child, any error did not affect respondent's substantial rights. The trial court's decision reveals that the court relied on ample evidence apart from Dr. Haugen's psychological evaluation to find that termination of respondent's parental rights to his older child was justified. Respondent failed to provide proper care and custody for his child. He exposed her to drugs and weapons in the home. The trial court found that respondent had a serious substance abuse problem and, despite attempts at treatment, he was unable to consistently stop using drugs. This finding is supported by the evidence of respondent's several positive drug screens and admitted relapses throughout the proceedings, and the discovery of a methamphetamine operation during a search of respondent's home in February 2011. The trial court also found that respondent continued to struggle with his relationship issues with his oldest child. The child exhibited oppositional defiant disorder and other serious emotional problems, which her therapist testified were usually related to inconsistent parenting. The child's therapist also opined that respondent's drug abuse interfered with his ability to be a consistent, involved parent to his child. Respondent failed to obtain services to address his child's psychological problems, and he ignored her during visitation. During one visit, respondent disciplined the child by slapping her, and although he verbally indicated that he should not have done this, he attempted to justify and minimize the incident at the termination hearing. Respondent's therapist testified that respondent failed to achieve the goals of maintaining sobriety and managing his anger. Because the trial court's decision to terminate respondent's parental rights to his older child was based on evidence independent of the Dr. Haugen's psychological evaluation, the introduction of Dr. Haugen's psychological evaluation testimony in the case involving respondent's other two children did not affect respondent's substantial rights.

III. OPINION TESTIMONY

Respondent next argues that reversal is required because several witnesses offered improper opinion testimony without having been qualified as expert witnesses under MRE 702. Because respondent did not object to the challenged testimony below, this Court's review of this issue is limited to plain error affecting respondent's parental rights. *In re Utrera*, 281 Mich App at 8.

Respondent challenges the testimony of Berry Stephens, Elizabeth Gass-Boshoben, and Linda Williams. For the most part, these witnesses testified regarding their personal involvement with respondent. To the extent that they offered testimony that could be considered expert testimony within the scope of MRE 702, there was no plain error because the record indicates that their testimony was related to matters for which they had special experience, or had received specialized education or training. MRE 702 provides that a witness may be qualified as an expert "by knowledge, skill, experience, training, or education." Stephens had eight years of experience as a mental health and substance abuse therapist. Williams had 31 years of experience in counseling, including 11 years of experience as a limited license psychologist. Her work experience included positions as a juvenile probation officer and a Families First worker. Gass-Boshoben was a licensed counselor, with 12 years of experience in adult substance abuse treatment. Further, MRE 701 allows a lay witness to offer an opinion or inferences that are rationally based on the witness's perceptions and that are helpful to a clear understanding of the witness's testimony or a determination of a fact in issue. Much of Stephens's and Gass-Boshoben's testimony was rationally based on their perceptions of respondent's behavior during their relationship. In view of the witnesses' qualifications, there was no plain error in permitting them to offer opinion testimony with respect to matters within the subject area of their training and experience.

For these reasons, the challenged testimony was not plain error. Respondent also argues that his attorney was ineffective for failing to object to the witnesses' testimony. But because respondent has not demonstrated that the challenged testimony was improper, his ineffective assistance of counsel claim cannot succeed. *In re CR*, 250 Mich App at 198. Any objection would have been futile.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher