# STATE OF MICHIGAN

# COURT OF APPEALS

In the Matter of ASC and EBW, Minors.

UNPUBLISHED
August 7, 2014

No. 320521
Lapeer Circuit Court
Family Division
LC Nos. 13-003317-RL
13-003318-RL

Before: JANSEN, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Respondent appeals the trial court's orders that terminated her parental rights to the minor children under § 29(7) of the Adoption Code, MCL 710.29(7) (termination following release). Specifically, she challenges the trial court's denial of her motion to withdraw the releases. For the reasons stated below, we affirm.

## I. PROCEDURAL HISTORY

This case originates in a separate proceeding where the Department of Human Services (DHS) sought to terminate respondent's parental rights under the Juvenile Code, MCL 712A.1 *et seq*. After a termination hearing began, but before it concluded, respondent released her parental rights to the children. She then abruptly changed her mind and filed a motion for rehearing, which the trial court treated as a motion to withdraw the releases. Among other things, her motion asserted that she was under duress when she executed the releases "due to the stress of the ongoing trial." At the motion hearing, respondent claimed she wanted to withdraw the releases because of: (1) her diagnosed mental health issues; (2) the possibility that she had postpartum depression; (3) her "tired and exhausted" and "mentally drained" state after testifying at the termination hearing, which allegedly caused her to "not think[] clearly" when she executed the releases; and (4) her attorneys' supposed advice that if she did not release her parental rights to the children at issue, she would also lose custody of her new baby. The trial court found her arguments unconvincing and denied her motion.

Respondent appealed the denial to our Court and makes the following arguments: (1) she did not knowingly and voluntarily release her parental rights; (2) the releases, as made, violated

MCL 710.29(5)(c) and (d); (3) she was not competent to execute the releases; and (4) her trial counsel gave her ineffective assistance.

## II. ANALYSIS[1]

### A. RELEASE OF PARENTAL RIGHTS

A release "is valid if executed in accordance with the law at the time of execution." MCR 3.801(B). The law requires that the release may not be executed "until after the investigation the court considers proper and until after the judge" fully explains to the parent her legal rights and the fact that those rights will be relinquished permanently. MCL 710.29(6). If the parent executes a release for a child over the age of five, the court must determine "that the child is best served by the release." *Id*. Upon the release by the parent, the court must immediately enter an order that terminates the parent's rights to the child. MCL 710.29(7).

Once parental rights have been terminated, the parent may file a motion to revoke the release or request rehearing. MCL 710.29(10); MCL 710.64(1); MCR 3.806(A). "The court may grant a rehearing only for good cause." MCR 3.806(B). Good cause is generally considered to be a legally sufficient or substantial reason. *In re Utrera*, 281 Mich App 1, 11; 761 NW2d 253 (2008). A parent's change of heart alone is not grounds to set aside a release that is otherwise knowingly and voluntarily made after proper advice of rights given by the court. *In re Burns*, 236 Mich App at 292-293; *In re Curran*, 196 Mich App 380, 385; 493 NW2d 454 (1992).

Here, plaintiff claims that she did not knowingly and voluntarily release her parental rights, when that is precisely what she did. The court advised respondent that signing the releases would result in the release of her parental rights, and respondent said she understood those rights. When she indicated that she felt she had no choice but to release her parental rights because it appeared her parental rights would be terminated, the court informed her that it had not made any decision in the matter and that she could proceed with the termination hearing. Respondent ultimately admitted that she was releasing her parental rights "willingly" and that no one was forcing her to do so.

Further, respondent read the releases before signing them. The releases informed her "that [she did] not have to sign this release" and that she was acting "[o]f [her] own free will." The court told respondent to sign the release forms "if that's your decision" and she did so. The court also explained that respondent could not later revoke the releases merely because she changed her mind. Instead, she would have to show a good reason for the revocation, such as

[1] A request to set aside a release is a matter within the discretion of the trial court and the court's ruling is thus reviewed for an abuse of discretion. *In re Burns*, 236 Mich App 291, 293; 599 NW2d 783 (1999). A trial court abuses its discretion when its decision results in an outcome falling outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A trial court also abuses its discretion when it makes an error of law. *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009).

"some sort of fraud or misrepresentation." Although respondent did not understand that phrase, the court explained it to her and she stated that she understood the explanation.

While respondent claims she was in a poor physical and mental state when she signed the releases, nothing in the record suggests that her physical or mental condition had any impact on her ability to understand the release proceedings. The trial court noted that the release was respondent's idea, raised after she had time to recover from the previous day's hearing, and the court advised her that she could continue with the hearing if she wanted. Moreover, there is nothing in respondent's statements to indicate that she was "not thinking clearly" or otherwise unable to understand the proceedings. She responded appropriately to the questions asked of her and even asked a question when she did not understand something the court said.

Respondent's claim that her attorney somehow induced her to release her parental rights by suggesting that doing so would allow her to retain rights to her new baby is equally unavailing. As noted, respondent told the trial court that her agreement to the release was free and willing. And, in the criminal context, a promise of some benefit in exchange for a plea does not, in and of itself, render a plea involuntary. A defendant can withdraw his plea only if a promise made to induce the plea is unfulfilled. *People v Eck*, 39 Mich App 176, 178; 197 NW2d 289 (1972). Respondent has not claimed that any promise made by her attorney that induced the release—if such a promise was ever made—was not kept.

B. MCL 710.29(5)(C) AND (D)

A release must be accompanied by a verified statement signed by the parent; the statement must contain certain information prescribed by statute. MCL 710.29(5). It must state that the parent "has not received or been promised any money or anything of value for the release of the child, except for lawful payments that are itemized on a schedule filed with the release." MCL 710.29(5)(c). The references to both "money" and "payments" suggest that "anything of value" is also something of pecuniary value so as to not run afoul of the law prohibiting the sale of children. See MCL 750.136c. The verified statement must also state that "the validity and finality of the release is not affected by any collateral or separate agreement between the parent . . . and the agency, or the parent . . . and the prospective adoptive parent." MCL 710.29(5)(d).

Here, respondent wrongly claims that the releases violated MCL 710.29(5)(c) and (d). They actually complied with both statutes. Respondent's allegation that her lawyer promised her an intangible benefit—the opportunity to retain her parental rights to a new baby—is belied by the record.[2] Respondent was specifically asked if she was promised anything of value for the

[2] Even if the lawyer actually made such a promise, it would not have violated MCL 710.29(5)(c), because it is not a monetary benefit. See MCL 750.136c.

releases, and she answered in the negative. She should be held to her record denial. See *People v Weir*, 111 Mich App 360, 361; 314 NW2d 621 (1981).[3]

## C. COMPETENCY

In the criminal context, a defendant "must be competent in order to plead guilty." *People v Whyte*, 165 Mich App 409, 411; 418 NW2d 484 (1988). "[A] defendant is presumed competent to stand trial unless his mental condition prevents him from understanding the nature and object of the proceedings against him or the court determines he is unable to assist in his defense." *People v Mette*, 243 Mich App 318, 331; 621 NW2d 713 (2000). Where the defendant does not raise the issue of his competency, "the trial court ha[s] no duty to *sua sponte* order a competency hearing," *People v Inman*, 54 Mich App 5, 12; 220 NW2d 165 (1974), unless facts are brought to the trial court's "attention which raise a 'bona fide doubt' as to the defendant's competence." *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). "A defendant is not considered incompetent to stand trial if he is or has been prescribed psychotropic drugs or other medication without which he might be incompetent to stand trial." *Mette*, 243 Mich App at 331.

In this case, respondent asserts that she was not competent to execute the releases and the trial court should have held a hearing to determine her competency. Again, her claims are unsupported by the record and have no merit whatsoever. Respondent evidently had a mental health condition and was prescribed medication.[4] The trial court found that respondent had resumed taking her medication after the delivery of her most recent child and counsel stated that respondent "is currently taking her prescription drugs as required and is functioning well right now." There was nothing to indicate that respondent was off her medication or otherwise detrimentally affected by her mental illness at the time she executed the releases, and her words or actions in the transcript do not indicate that she lacked competency such that the court should have inquired into the issue further.[5]

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[3] Respondent's claims, based on the definition of "agency" in MCL 710.29(5)(a), that she had an agreement with DHS to allow her to retain her parental rights to her new baby, are unsupported by the record and have no merit. The term "agency" refers not to just any agency but to "a child placing agency," MCL 710.29(5)(a), i.e., a private organization licensed to place children for adoption. MCL 710.22(k). The DHS, which was formerly known as the Family Independence Agency, *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 311 n 5; 805 NW2d 226 (2011), is not such an agency and is separately referred to as the "department." MCL 710.22(n).

[4] Counsel theorized that respondent could have postpartum depression as well, but presented no evidence in support of that belief.

[5] Respondent's contention that the trial court failed to determine the interests of a child over five years old is equally unconvincing. As noted, if the parent executes a release for a child over the age of five, the court must determine "that the child is best served by the release." MCL 710.29(6). The trial court complied with this requirement, finding that "after having taken numerous testimony [sic] in this matter, that the release serves the best interest of the child."

## D. ASSISTANCE OF COUNSEL

"[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." *In re EP*, 234 Mich App 582, 598; 595 NW2d 167 (1999), overruled in part on other grounds by *In re Trejo*, 462 Mich 341, 353, n 10; 612 NW2d 407 (2000). To establish ineffective assistance of counsel, a criminal defendant must "show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy." *People v Horn*, 279 Mich App 31, 37 n 2; 755 NW2d 212 (2008).

Here, respondent claims her attorney provided her ineffective assistance because counsel advised her that signing the release "was the only way she'd be given a shot to parent" her new baby. Although respondent raised this issue in the trial court, she did not request an evidentiary hearing and no such hearing was conducted. Therefore, review is limited to errors apparent from the record. *Horn*, 279 Mich App at 38.

Nothing in the record shows that any attorney who represented respondent said anything to her about being able to parent another child if she released her parental rights to the children at issue. Further, despite her claim that counsel's advice rendered counsel ineffective, respondent acknowledged that counsel had "correctly advis[ed her] of the law regarding termination proceedings and subsequent children . . . ." If counsel provided correct advice, his or her performance was not objectively unreasonable.

Because the trial court provided respondent with the necessary advice to enable her to make an informed decision, and the record does not support respondent's claims that she acted involuntarily, that she was incompetent, or that she received ineffective assistance of counsel, the trial court did not abuse its discretion when it denied respondent's motion to revoke the releases.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Pat M. Donofrio

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Although the court did not make any factual findings supporting its determination, nothing in the Adoption Code or related court rules required it to do so. Compare MCR 3.977(I)(1) (requiring that the court make findings of fact when ruling on a petition for termination of parental rights under the Juvenile Code). Further, respondent has not identified any facts or circumstances indicating that the court's determination was incorrect.