STATE OF MICHIGAN

COURT OF APPEALS

In re D. M. WOGOMAN, Minor.

UNPUBLISHED
November 20, 2014

No. 322053
Kalamazoo Circuit Court
Family Division
LC No. 2013-000134-NA

Before: BOONSTRA, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

On May 21, 2014, the circuit court terminated the parental rights of both respondent-mother and her boyfriend to their minor daughter. In relation to respondent, the court relied upon MCL 712A.19b(3)(a)(*ii*) (parent has deserted the child for 91 or more days), (c)(*i*) (conditions of adjudication continue to exist), (c)(*ii*) (other conditions exist that could have caused the child to come within the court's jurisdiction and they have not been rectified), and (g) (failure to provide proper care and custody). Respondent does not argue that the termination grounds were insupportable or that termination was not in the child's best interest. Rather, respondent claims that her due process rights were violated when an attorney who served as substitute counsel for the child's father at the initial probable cause hearing was assigned as her counsel at the termination hearing. Respondent also challenges the circuit court's failure to ascertain at the initiation of the proceedings whether the child had Native American heritage. We discern no prejudicial error and therefore affirm.

I. BACKGROUND

The Department of Human Services took respondent's newborn daughter into care when her meconium tested positive for cocaine and marijuana. For the first three months of the child's life, respondent and the child's father participated in parenting time sessions. Respondent also submitted to random drug screens and secured employment. This was the extent of respondent's attempts to regain custody of her child. Respondent never participated in a court-ordered psychological or substance abuse evaluation. She never attended counseling or AA or NA meetings. Tragically, both of respondent's parents died during the proceedings and she travelled to Tennessee to attend to family affairs. Respondent apparently failed to secure her employer's approval of her five-week trip and was discharged from her position. Respondent was absent from several hearings during the current proceedings. Respondent also became pregnant again during the proceedings and completely failed to secure prenatal care. That child was born with

methamphetamine and cocaine in his system, was taken into care, and was the subject of a separate child protective proceeding.

II. DUE PROCESS/CONFLICT OF INTEREST

On appeal, respondent does not challenge the circuit court's findings related to the statutory grounds for termination or its finding that termination was in the child's best interests. Rather, respondent argues for the first time that the circuit court violated her fundamental right to due process by failing to recognize that a conflict of interest existed pursuant to Michigan Rule of Professional Conduct (MRPC) 1.9(a). As respondent failed to preserve her challenge with a timely objection below, our review is limited to plain error affecting respondent's substantial rights. *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011).

At the March 20, 2013 preliminary hearing, attorney Michael Dzialowski acted as substitute counsel for the child's father in the absence of the father's appointed counsel. At the 23-minute hearing, respondent stipulated to the grounds cited as probable cause to take the child into custody. The child's health and the parenting time schedule were discussed on the record. Attorney Dzialowski's involvement was limiting to questioning whether the child could be placed with the father or with the father's adult daughter in lieu of a foster care placement. Dzialowski's statements at the hearing reflected his knowledge that the father was abusing marijuana at that time and would not pass a drug test.

Respondent was represented by attorney Philip Carey during these proceedings. Attorney Dzialowski acted as substitute counsel for respondent at the termination hearing, although there is no record explanation of Carey's absence. Neither respondent nor the child's father objected to this representation. The record reflects that Dzialowski zealously advocated for respondent at that hearing.

We discern no conflict of interest that could have prejudiced respondent's substantial rights. MRPC 1.9(a) provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." Dzialowski formerly represented the father in the child protective proceeding and then represented respondent, "another person," in the same proceeding. The record is silent on the matter, leading us to presume that Dzialowski did not secure the father's consent to represent respondent as directed in MRPC 1.9(a). However, the parties' interests were not "materially adverse."

Respondent and the child's father were in a relationship and cohabitated during the entirety of the child protective proceeding. They expressed their wish to marry in the future and conceived and gave birth to a second child. They also expressed their desire to have the subject child returned to their joint care. Respondent and the child's father presented a united front. Respondent now asserts that her efforts toward satisfying the case service plan were greater than the father's, placing their interests in conflict. Respondent's participation was minimal, however, and was limited to the first three months of the year-long proceedings. She made absolutely no effort to comply with her case service plan thereafter. Accordingly, there is no

record support for the claimed conflict of interest and we perceive no record indication that respondent's rights were impaired in any way.

III. NATIVE AMERICAN HERITAGE

Respondent also contends for the first time on appeal that conditional reversal of the termination order is necessary because the trial court failed to comply with MCR 3.965(B)(2) and determine if the child was of Native American heritage. MCR 3.965(B)(2) provides that, at the preliminary hearing, "[t]he court must inquire if the child or either parent is a member of an Indian tribe. If the court knows or has reason to know the child is an Indian child, the court must determine the identity of the child's tribe. . . ."

Respondent accurately notes that the circuit court failed to make the required inquiry on the record. However, respondent suffered no prejudice as a result. There is no record evidence to support that the child had any Native American heritage. An updated service plan labeled the child as Caucasian and African American, and reflected that the parents informed the DHS that the child was not a member of a tribe. Sometime later in the proceedings, the father indicated that he may have Apache heritage. The DHS investigated this claim and it was denied by the tribe. Accordingly, even if the court had made the required inquiry, respondent and her child would not be entitled to application of the more stringent standards available under the Indian Child Welfare Act, 25 USC 1901 *et seq*.

We affirm.

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher