

STATE OF MICHIGAN
COURT OF APPEALS

In re JONES, Minor.

UNPUBLISHED
December 11, 2014

No. 321397
Washtenaw Circuit Court
Family Division
LC No. 2012-000064-NA

Before: RONAYNE KRAUSE, P.J., and K. F. KELLY and STEPHENS, JJ.

PER CURIAM.

Respondent father appeals as of right from an order terminating his parental rights to his two-year-old child pursuant to MCL 712A.19b(3)(g) (failure to provide proper care or custody) and (j) (child would likely be harmed if returned to the parent).¹ Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

On June 25, 2012, the Department of Human Services (DHS) filed a petition seeking the child's removal from her mother's care and termination of the mother's parental rights based on the mother's prior termination and the fact that she tested positive for cocaine before the child's birth in May 2012. The child was born prematurely at 26 weeks' gestation. She had a host of medical problems and would require several months' stay at the hospital. The mother reported that she did not know who the child's father was.

Respondent appeared at hearings on July 2, 2012 and August 7, 2012, indicating that he believed he was the child's father. By the October 9, 2012 hearing, DNA testing confirmed that respondent was the child's biological father; he and the mother executed an affidavit of parentage. DHS indicated that it would be filing an amended petition to add him as a respondent

¹ The parental rights of the child's mother were terminated on December 21, 2012, following her no-contest plea and a best interests hearing. The mother appealed, arguing that the trial court erred in failing to allow her to withdraw her plea. This Court affirmed termination of her parental rights. *In re Jones*, unpublished opinion of the Court of Appeal, issued July 16, 2013 (Docket No. 314307).

to the case. At the same hearing, the mother pleaded no contest to the allegations in the original petition and an adjudication order was entered on November 9, 2012.

An amended petition adding respondent to the case was filed on October 25, 2012. The petition alleged that respondent had an extensive criminal history, including felonious assault, resisting and obstructing police, operating under the influence of alcohol, and domestic violence. Given his criminal history, DHS alleged that respondent was not a suitable placement for the child. The child had recently been released from the hospital and was in a foster care placement with her two older half-siblings. The foster parents had undergone approximately four months of training to learn to care for the child's extensive needs, which included a feeding tube, a tracheotomy tube, and a ventilator.

On November 19, 2012, the trial court ordered that respondent be trained to care for the child. However, at a December 4, 2012 hearing, the parties discussed the difficulty of complying with the order. In order to properly train respondent, the child would have to be readmitted into the hospital, which the hospital advised against in light of the child's susceptibility to illness.

At a pretrial hearing on December 7, 2012, the matter of respondent's possible Native American heritage was discussed, even though respondent had twice previously denied such heritage. The matter was adjourned to allow tribal notification. Ultimately, neither respondent nor the child was eligible for enrollment in the Tuscarora Tribe.

At an April 9, 2013 hearing, the foster care worker reported that respondent had been visiting the child at the foster care family's home a few times a week and was appropriate. However, although the worker had developed a treatment plan, respondent was not participating in services because he had not been ordered to do so. The worker recommended a psychological evaluation and drug screening, given defendant's history of impaired driving. The child needed 24-hour care and a caregiver who was substance free. Defense counsel indicated that ordering a non-adjudicated parent to comply with services was unconstitutional but that "under the state of Michigan law I'll acknowledge that adjudication in the way of the child's mother, the Court could order service compliance." The referee stopped short of ordering respondent to comply with services, but suggested that respondent do so.

Maternal grandmother Williams' emergency motion to intervene in the case was denied.

On June 3, 2013, respondent, represented by new counsel, admitted to some of the allegations in a third amended petition. Specifically, that "at the time Robert Jones established paternity to the child, Robert Jones was unable to provide for her care or custody" and "Robert Jones is still unable to provide for the child's proper care as of today."

The matter proceeded to a dispositional hearing on July 23, 2013. However, respondent's attorney did not appear. Respondent expressed his dissatisfaction with his attorney and requested appointed counsel. The Judson worker indicated that she provided respondent referrals but that he continued to refuse to sign the case service plan. Again, the referee warned respondent:

THE COURT: I can't give you legal advice, but I can tell you that it is in the interest of your reunification with [the child], if that is still your goal, for you to be working aggressively on your treatment plan.

MR. JONES: Right. And believe me you, I'm just as frustrated as anybody in this courtroom. I've never anticipated for one second that my daughter would be out of my life at this time when I be in my home. However, I do know there are laws that go; however, I'm unaware of them; I'm not an attorney. With respect to that – I mean, if it was up to me, things would have been different. However, it's not. And at this point, again, I'm just, I guess, a little confused or feared or scared, so to speak, to move forward without legal counsel. I mean, I feel at this time --

THE COURT: Every day you delay is delay in [the child] being restored to your care. And that's the only message I want to get across. You know, we can litigate the treatment plan till the cows come home, and that's fine, and that's something you're entitled to do. It's just – It strikes me that every day tacks a day onto the specific services that you will undoubtedly be required to participate in.

Disposition finally occurred on August 13, 2013. Respondent's newly appointed attorney indicated that he was unable to make contact with respondent, whom he believed was in jail. The Judson worker indicated that she presented respondent his treatment plan earlier that month and "explained the services in length with him again, and let him know, you know, about – regarding his treatment plan. Mr. Jones reported that he doesn't feel that he has to do it. And that was the last that I had heard from him regarding his treatment plan." The worker also indicated that she had "explained in length with Mr. Jones the importance of having an alternate caregiver to assist in the child's medical care" but he had not designated anyone. In adopting the service recommendations, the referee noted that "[t]he reality is it's late in the game for Mr. Jones to be starting his treatment plan, if he intends to start his treatment plan, which seems questionable." The referee indicated that if no progress is made by the date of the next hearing, she would likely change the permanency goal.

A review hearing was held on November 26, 2013. The Judson worker reported that respondent had been in jail and that she had difficulty making contact with him. Respondent's attorney indicated that respondent had been in jail for approximately six months in the past year. The attorney had only been able to meet with respondent for approximately 45 minutes before the hearing, at which time he "had a rather frank conversation regarding the permanency plan, the need for him to execute it and the need for him to show [c]ompliance." Counsel requested that the court not change its permanency plan for 30 days. While the referee recommended that services continue to be made available to respondent, she recommended that the goal be changed to termination. "We'll see where things stand. . . there is time yet for him to make a significant effort toward services."

DHS filed a termination petition on December 20, 2013, seeking to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(c)(i), (g) and (j).

A pretrial hearing was held on January 28, 2014. Respondent had filed a motion to have the child placed with Williams. In November 2013, he had executed a power of attorney to Williams, delegating parental authority to her in the event that the courts “obstructed” respondent’s parental rights. The referee recommended that DHS conduct a home study.

At a February 6, 2014 hearing, it was revealed that a home study had previously been conducted when one of Williams’ other grandchildren was removed from his mother’s care. Williams’ home was physically suitable, but placement with Williams was denied because she had an aggressive communication style and referred to the children as having been “kidnapped.” She did not appreciate why the children were removed. There were also problems with Williams at the hospital after the child in this case was born, causing Williams to be removed from the hospital. She would not stop tape-recording hospital staff. Williams was asked not to return until she had a meeting with the behavioral management team. The referee took judicial notice of the fact that Williams had a CPS history, which included “erratic conduct.” The referee also referenced the “fraudulent” attempt to establish a guardianship in Wayne County when the mother’s case was pending. The referee concluded that the child would not be safe in her care. “Because of [the child’s] significant medical needs, an accommodation like a durable power of attorney would be, in my judgment, a patently unreasonable resolution of this case.”

A termination hearing was held on February 6, 2014 and March 12, 2014. On March 28, 2014, the trial court adopted the referee’s recommendation and ordered that respondent’s parental rights be terminated. He now appeals as of right.

II. STANDARD OF REVIEW

On appeal, respondent argues that his due process rights were violated. “Whether child protective proceedings complied with a parent’s right to procedural due process presents a question of constitutional law, which we review de novo.” *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014).

Respondent does not appear to challenge the trial court’s finding regarding the grounds for termination. Nevertheless, “[w]e review for clear error both the court’s decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court’s decision regarding the child’s best interest under MCL 712A.19b(5). A trial court’s decision is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.” *In re Olive/Metts Minors*, 297 Mich App 35, 40–41; 823 NW2d 144 (2012) (internal quotation marks and citations omitted).

III. ANALYSIS

A. IN RE SANDERS

Respondent cites *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014) for the notion that a court cannot compel a parent to comply with a case services plan who has not been adjudicated. He complains that he was denied due process because he was essentially punished for the mother’s conduct.

In *Sanders*, a mother pleaded no contest to allegations of neglect and abuse as to her two children. The children’s father, Lance Laird, requested an adjudication hearing but DHS subsequently dismissed the remaining allegations against him. Nevertheless, the trial court ordered Laird to comply with the parent-agency agreement and his visitation was restricted to supervised parenting time. The trial court rejected Laird’s argument that it had no legal authority to condition the placement of his children on compliance with a case service plan when he had not been adjudicated as unfit. 495 Mich at 402-403.

On appeal to the Supreme Court, Laird argued that the so-called one-parent doctrine was unconstitutional because it allowed courts to infringe the rights of unadjudicated parents to direct the care, custody, and control of their children without an adjudication that those parents were unfit. *Id.* at 413. The Supreme Court agreed, and rejected the notion that a parent’s due process rights were protected by virtue of dispositional proceedings. While MCR 3.973(A) permitted a trial court to enter dispositional orders against “any adult,” the phrase was not meant to include an unadjudicated parent. *Id.* at 414. Moreover, “[t]he procedures afforded parents during the dispositional phase are not related to the allegations of unfitness because the question a court is answering at a dispositional hearing assumes a previous finding of parental unfitness.” *Id.* at 418. Also unpersuasive was the suggestion that adjudication of one parent afforded sufficient process to the other. An unadjudicated parent should not have to rely on the respondent parent to provide a vigorous defense to the allegations. *Id.* at 419. Nor was the state relieved of seeking adjudication simply because an unadjudicated parent might have the future opportunity to restore his parental rights if he complied with the case service plan and court orders. Such an argument “puts the plow before the mule.” *Id.*

The *Sanders* Court noted that the state’s interest in protecting children must be balanced against the fundamental interest a parent has to parent his own child – “[w]hen the state is concerned that *neither* parent should be entrusted with the care and custody of their children, the state has the authority—and the responsibility—to protect the children’s safety and well-being by seeking an adjudication against *both* parents.” *Id.* at 421-422 (emphasis in original). Therefore, “due process requires a specific adjudication of a parent’s unfitness before the state can infringe the constitutionally protected parent-child relationship.” *Id.* at 422.

Here, unlike in *Sanders*, it was clear from the beginning that DHS would seek separate adjudication as to respondent. When the child was born in May 2012, respondent was, at most, a putative father. Once his paternity was established in October 2012, DHS moved to immediately amend the petition to add him as a respondent. The primary issue was respondent’s inability to care for the child’s extensive medical needs, an allegation to which respondent admitted at the June 2013 adjudication. A variety of issues arose which prevented adjudication from occurring until June 2013, including respondent’s failure to timely advise workers and the court of his potential Native American heritage. Also, unlike in *Sanders*, the child had special needs and could not immediately be placed in respondent’s home. Services were made available to respondent but, choosing to believe that the case service plan had nothing to do with him, respondent failed to avail himself of those services, significantly impacting his ability to care for the child. In *Sanders*, the Supreme Court noted that a “trial court may order temporary placement of the child into foster care pending adjudication if the court finds that placement in the family home would be contrary to the welfare of the child. MCR 3.965(B)(12)(b) and (C). Because our holding only reaches the court’s exercise of its postadjudication dispositional

authority, it should not be interpreted as preventing courts from ordering temporary foster-care placement pursuant to MCR 3.965(B)(12)(b) and (C).” 495 Mich at 417, n 12.

Respondent argues that the trial court should have acted on the November 2013 durable power of attorney wherein he named Debbie Williams as the child’s guardian in the event the court “obstructed” his ability to parent. However, placement with Williams was explored and found to be inappropriate.

B. IN RE MASON

Respondent also complains that his incarcerations were used against him, in violation of *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010). In *Mason*, the father’s parental rights to his two children were terminated while he was incarcerated. The Michigan Supreme Court reversed the termination, finding that “[t]he state is not relieved of its duties to engage an absent parent merely because that parent is incarcerated.” 486 Mich at 152. And, “because the DHS and the court failed to adhere to court rules and statutes, respondent was not afforded a meaningful and adequate opportunity to participate” and termination of his parental rights was premature. *Id.* The father was denied participation in the proceedings except for at the pretrial and permanency planning hearing. *Id.* at 153.

Although respondent participated by phone in the July 24, 2007, pretrial hearing, he was not offered the opportunity to participate in the review or permanency planning hearings held from August 2007 through July 2008. By the time respondent participated in the December 3, 2008, permanency planning hearing—16 months after he last participated—the court and the DHS were ready to move on to the termination hearing. Thus, respondent missed the crucial, year-long review period during which the court was called upon to evaluate the parents’ efforts and decide whether reunification of the children with their parents could be achieved. Indeed, respondent was practically excluded from almost every element of the review process . . . [*Id.* at 154-155.]

Not only was the father in *Mason* deprived of participation at the various court proceedings, there was no evidence that he was ever presented with the case service plan. The worker admitted that no steps were taken to include the father. The father, whose earliest release date was not that far into the future, was never considered for future placement or services. *Id.* at 156-160. Essentially, “[t]he state failed to involve or evaluate respondent, but then terminated his rights, in part because of his failure to comply with the service plan, while giving him no opportunity to comply in the future.” *Id.* at 159 (footnote omitted).

The Supreme Court concluded that, under the particular facts of that case, the father’s incarceration was the sole reason his parental rights were terminated. *Id.* at 160. The Court held that “[t]he mere present inability to personally care for one’s children as a result of incarceration does not constitute grounds for termination.” *Id.* Under MCL 712A.19b(3)(h), a parent’s incarceration may be sufficient grounds for termination, but only if it is for a period exceeding two years, the parent has not provided for the child’s care, and there is no probability that the parent will be able to do so within a reasonable time. *Id.* at 161. An incarcerated parent may, for example, provide a child proper care or custody by granting legal custody to relatives. The

children in *Mason* were in relative placement with the father’s family. *Id.* at 163. The trial court failed to consider the relative placement, which weighed against termination. *Id.*

The Court concluded that “[t]he overriding error in this case is the failure—of the court, the DHS, and indeed respondent’s attorney—to acknowledge and honor respondent’s right to participate. Although respondent must take responsibility for his own past failures, the court’s largely uninformed presumption of his unfitness is not a sufficient basis for termination.” *Id.* at 168. The Court finished its analysis with this thought:

Because of the state’s failures, termination was premature. In the words of the children’s lawyer at the close of the termination hearing, respondent was “trying to fulfill an agreement that never really made any accommodations to the fact that he was hamstrung from the beginning [in] trying to get things in order so that he can one day be a father to these children.” Neither the court nor the DHS properly facilitated respondent’s right to participate in the proceedings, ensured that he had a meaningful opportunity to comply with a case service plan, or considered the effect of the children’s placement with his family. [*Id.* at 169.]

The case at bar is distinguishable from *Mason*. In contrast to *Mason*, DHS provided respondent with a case service plan and attempted to actively engage him in services. He had the opportunity to participate in the service plan, but did not based on his strongly held belief that he should not have to do so.²

C. STATUTORY GROUNDS

Respondent’s parental rights were terminated pursuant to MCL 712A.19b(3)(g) and (j), which provide:

(3) The court may terminate a parent’s parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child’s age.

² We note the irony of respondent’s arguments on appeal. In one breath he complains that he was ordered to comply with a case service plan before he was adjudicated and in the next breath he complains because not enough was offered to him.

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

There was clear and convincing evidence on the record to support the trial court's decision to terminate respondent's parental rights. Respondent had been ordered to attend parenting classes, submit to substance abuse evaluation, attend individual counseling, obtain both psychological and psychiatric evaluations, find suitable housing, find a legal source of income, and visit with the child. Respondent, who took no steps to read, sign, or work on the service agreement, never received the medical training necessary to care for the child because he never took the preliminary steps needed. The child, who was born at 26 weeks gestation, had extensive medical needs. She used a ventilator at night and had a tracheotomy tube. A caregiver would have to receive extensive training to learn all that was required to care for the child. The training was so extensive that the child would have to be re-admitted into the hospital for respondent to learn all that he needed. Respondent was advised that, in order to receive such training, he would have to locate a secondary caregiver to undergo the same extensive training. He failed to do so.

In addition to respondent's lack of training, there was evidence that respondent suffered from alcoholism. And, while respondent had attended in-patient care while the case was pending, he testified that he did so in order to avoid the consequences of failing to obtain a tether, which was a condition of his probation in a criminal matter. The trial court noted respondent's continued lack of insight as to his problem, even with extensive services. That is particularly troubling, given that the child needed vigilant and intense 24-hour care. Her caregiver would have to be substance free. There was also evidence that respondent smoked, which placed the child at risk.

At the time of the termination hearing, respondent was unemployed, had no driver's license, and had just moved back into his father's home. Aside from substance abuse counseling, respondent had not completed any other aspect of the service agreement. In light of the foregoing evidence, it was clear that respondent was not able to provide the child with proper care or custody and that placing her in his care would have put the child at risk of harm.

A preponderance of the evidence demonstrated that termination of respondent's parental rights was also in the child's best interests. *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013).

To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [*In re White*, 303 Mich App 701, 713-714; 846 NW2d 61 (2014) (internal quotation marks and footnotes omitted).]

The child spent several months in the hospital after she was born. In October 2012, she was released to her current foster placement where both of her half brothers also live. The foster parents received extensive training to care for the child and had valiantly done so for two years. The child was bonded to her foster family and was flourishing in their care. Respondent did not consistently visit the child. He visited from January to March 2013 at the foster family's home, but then stopped visiting altogether in April 2013 after the foster parents asked for a more precise visitation schedule. Respondent saw the child in August 2013 for a visit and then began a more regular schedule from January 2014 up to the time of the termination hearing.

Although there is no doubt that respondent loves his child, the evidence reveals that he does not truly appreciate the extent of her needs and limitations. An example of this is respondent's failure to take sign language classes, even though the child has always been hearing and speaking impaired. Respondent cannot meet the child's special needs. The child is entitled to the permanence and stability her foster home offers, with people who have indicated a desire to adopt her.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens