STATE OF MICHIGAN

COURT OF APPEALS

	UNPUBLISHED August 8, 2013
In the Matter of K. FARRIS, Minor.	No. 311967 Antrim Circuit Court Family Division LC No. 10-005512-NA
In the Matter of FARRIS/JESKA, Minors.	No. 312193 Antrim Circuit Court Family Division LC No. 10-005512-NA
In the Matter of JESKA, Minors.	No. 312194 Antrim Circuit Court Family Division LC No. 10-005512-NA

Before: SERVITTO, P.J., and WHITBECK and SHAPIRO, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I dissent from the majority's decision to affirm the termination of parental rights of James Farris as to his child. Of the four children involved in this case, Farris is the father of only one, the eldest. At the time the case arose, all four children were living with their mother, Samantha Thornburg, and Anthony Jeska, the father of the three youngest children. I concur with the majority's decision to affirm the termination of parental rights as to Thornburg and Jeska.

There were multiple errors below that mandate reversal as to Farris. First, the court erred at the outset of the case by taking jurisdiction over KF, where the original petition applied only to two other children in the mother's home. Second, Farris was denied equal protection of the law because he was not afforded the same procedural protections afforded the mother of his child in the adjudication proceeding. Third, Farris was denied due process of law when the court ordered that he comply with a DHS plan restricting access to his son and requiring him to

participate in programs and tests, despite the absence of any allegations that he was an unfit parent or even that his son had been abused or neglected by anyone at all. Fourth, the trial court erred in terminating Farris's parental rights it was not established by clear and convincing evidence that any statutory grounds for termination existed. Fifth, to the degree the termination can be considered to have been in the best interests of the child, this was only so after the child had lived apart from Farris as improperly required.

FACTS

This case involves four children. The eldest, KF, was born in 2004 and was the only child born of the marriage of Farris and his then-wife, Samantha Thornburg. The three younger children were born to Ms. Thornburg and Anthony Jeska. Farris was incarcerated from January 2006 to January 2008. Before and after Farris's incarceration, he shared custody of KF with Thornburg pursuant to a parenting time agreement.

On April 8, 2010, the two youngest children of Thornburg and Jeska were removed from the Thornburg/Jeska home on an emergency basis. The removal occurred as a result of information that Thornburg and Jeska were not providing the two youngest children with necessary medical care despite these two children's serious medical needs.

The original petition filed on April 8, 2010 contained specific allegations regarding the lack of needed medical care to the two youngest children. The petition contained *no* allegations as to neglect or abuse of KF or of his half-sister, the third of the Thornburg/Jeska children. The petition contained no allegations involving Farris other than the fact that he was KF's biological father. Nevertheless, the petition asked that the probate court assume temporary jurisdiction over each of the four children and "find them safe placement."

The two younger children were removed on April 8, 2010, and a hearing set for the following day pursuant to MCR 3.965(1). Farris was not served with notice of this hearing and neither he nor counsel on his behalf was present at the hearing. The court heard testimony regarding the two younger children's medical needs. After the April 9, 2010 hearing, despite the fact that no reference to KF was made during the entire proceeding and KF had not been removed, the judge entered an order taking temporary jurisdiction over all four children. The court released KF and the older Thornburg/Jeska child to the custody of Thornburg and Jeska, apparently satisfied that doing so provided the children with "safe placement."

A second supplemental petition was filed on April 13, 2010. The only addition as to Farris was an allegation of two drug convictions and a 2010 conviction for misdemeanor assault which arose out of physical contact between Farris and Thornburg during a parenting time exchange in March, prior to the removal of the two younger children.

A brief continuation of the preliminary hearing was held on April 14, 2010, but Farris did not receive timely notice and he was not represented. The attorneys and the court expressed some confusion over whether Jeska or Farris was the legal father of the younger children.

The preliminary hearing continued on April 28, 2010. Counsel for Farris, recently appointed by the court, was present, but Farris was not and it appears that notice to him had only been mailed the day before the hearing. At the hearing, Thornburg alone waived probable cause and based on that waiver, the court authorized the filing of the petition in its entirety. The order executed on that date provided that Farris would be limited to supervised parenting time.

A hearing was next held seven weeks later, on July 14, 2010, at which time the evidence admitted clarified that Farris was the father of only KF, and that Jeska was the father of the three younger children. Farris also testified at this hearing that he had filed for divorce from Thornburg on June 15, 2010.

A third supplemental petition was filed on August 11, 2010. It correctly alleged that Farris had been incarcerated from 1/11/06 to 1/2/08 as a result of a 2006 drug conviction and, that on May 2010 Farris pleaded guilty, with a deferred sentence, to a single count of misdemeanor domestic violence occurring on March 19, 2010 during a parenting time exchange with Thornburg. The petition *incorrectly* alleged that while on probation from this misdemeanor conviction, Farris had two positive drug screens.[1] The petition further alleged that as a result of the assault conviction, Farris's probation order provided that he could not have contact with Thornburg and his parenting time with KF was to be supervised.

The record does not indicate that any other proceedings occurred until over three months later, on November 18, 2010, the date set for the adjudication. Farris's attorney was present, but Farris was not and his attorney told the court that "I don't know if he is aware of this [hearing] or not."[2] Thornburg was the only one of the three parents to make any admissions. She admitted paragraphs 1, 15 and 16 of the November 15, 2010 petition. Paragraph 1 stated that she was the mother of the four children. Paragraph 15 stated that she and Jeska had failed to provide for the medical needs of their two youngest children. Paragraph 16 stated that she and Jeska had failed to maintain stable housing. Based on these admissions, the trial court issued *two* orders of disposition. The first concerned the two younger, medically challenged children and continued their placement in foster care. The second order concerned KF and his half-sister both of whom were still living with Thornburg and Jeska. The order provided that the court was taking jurisdiction over the two older children and that the parents had all agreed to a "stipulation of the parties to adopt the Service Plan of 11/18/10." In fact, only Thornburg and Jeska stipulated to the Service Plan which provided that they would retain custody of KF. At the conclusion of the hearing, the court was therefore asked by the prosecutor if the court was adopting the Service Plan for Farris and the court stated that it was doing so.

[1] Two years later at the termination hearing, DHS conceded that the allegation that Farris had tested positive for drugs during his probation had been incorrect after Farris's probation agent testified that Farris never missed any of the weekly, and later bi-weekly, drug tests required as part of his probation and that he had never tested positive.

[2] The record does contain a proof of service by mail on November 3, 2010 of a notice of hearing. Farris's original counsel withdrew from the case on September 9, 2010 and new counsel was appointed that day.

Approximately three months later, on February 4, 2011, an emergency hearing was held before Referee Hefferran regarding emergency removal of the two older children - one of which was KF - from the Thornburg/Jeska home. The removal was necessitated by Jeska's physical attack on the Thornburg/Jeska child who remained at the home. At this hearing, counsel for Farris informed the court that upon removal from the Thornburg/Jeska home, Farris wanted KF to be placed with him stating, that

> "[Mr. Farris] stands ready, willing and able to parent KF and has parented him for a significant portion of his life. When this case came about, he had worked out an agreement where [Thornburg] would have KF for a period of time and then he would take him back later when he wasn't quite as busy working. And when school was over. Then all this came about and part of his incredible frustration is because this case is taking probably longer than any; I can think of one or two cases that I've been involved in, but it took an incredible amount of time to even get jurisdiction in this case. And he did do supervised visits for a long, long period of time. And he is incredibly frustrated that he's done all this and yet, still no disposition."

Kelly Schaub, a DHS service specialist, opposed placement with Farris on the grounds that he had stopped participating in scheduled supervised visitation and because he had had a positive drug test 10 months earlier while on probation. Farris's attorney denied any positive drug test results and as noted in n.2, supra, it was later demonstrated that there had not been any positive drug tests.

Schaub also testified that placement could be considered with Thornburg's parents or with Farris's parents though she stated that DHS had not yet contacted Farris's parents. The court gave DHS 30 days to investigate the grandparents or other relatives that may be available for placement and to report back to the court regarding that possibility. The court noted that "[t]here's a lot of family members clearly who have expressed interest in caring for these children. I think it does fall on us and it does fall on the department to exhaust those options prior to any type of formal foster care placement." On recommendation of the guardian ad litem, however, the referee declined to order immediate placement with relatives as there had not yet been a home study. The court directed that home studies take place prior to the review hearing scheduled for February 16th.

The February 16, 2011 review hearing took place before Judge Hayes. Contrary to the directives of the referee on February 4, 2011, no reference was made to a home study of Farris's parents and no such study appears anywhere in the record. The DHS caseworker, Jeannie Donegan, was the sole witness and before her testimony was concluded the hearing was adjourned to March 23, 2011. On March 23, 2011 at the continued hearing, the court informed the parties that a new caseworker, Ms. Scott had filed a "court addendum" on March 16, 2011 that had not yet been provided to the parents or their attorneys. The court recessed for a brief period to give the attorneys an opportunity to review the addendum. The addendum made no reference to possible placement of KF with Farris's parents or to any home study as to their fitness. Consistent with her addendum, Scott testified that Farris had complied with the AWARE Program through the MENS group and had taken responsibility for the reason he was assigned to

that program. She testified that Farris was self-employed, but had still not provided sufficient proof of that employment, that he had not yet scheduled his psychological evaluation and that he was not appearing for many of the parenting time appointments, nor for counseling sessions for KF as requested by the therapist. Farris's attorney explained his client's employment status and indicated that the psychological evaluation would be done soon. She reiterated Farris's willingness to be a full-time parent to his son. Farris spoke to the court himself as well stating:

> "I do understand that this isn't actually the hearing that I need to really go into this, but I just want it on the record that not only am I more than willing, I'm more than wanting to get my son back. I feel that I have made great strides towards showing that I'm more than capable of being a father. This whole process has been dragged out way long than I ever imagined. My concern is that my son is still in foster care, and I just would love to have my son back. What steps, actually have to be taken for that to happen?"

The court told Farris that he needed to complete his psychological evaluation and to attend his supervised parenting time and attend KF's counseling sessions.

The next hearing was a permanency planning/review hearing before Judge Hayes on April 27, 2011. Ms. Scott, on behalf of DHS requested that a termination petition be authorized as to the two young Thornburg/Jeska children who had originally been removed due to lack of medical care. She testified at length regarding the Thornburg's and Jeska's continued drug use and other problems.

Regarding Farris, Scott testified that "he has been participating with his Plan . . . he's become more consistent with his parenting time. He has scheduled a psychological evaluation. . . . he needs to be now attending the school conferences [and] . . . . he needs to attend [his son's] counseling appointments" for which she gave him a list of dates. She also noted that Farris was not required to do drug screens under the plan but that he had been doing them for probation and that DHS had received the test results all of which were negative. Scott also testified that Farris lived with his parents and that she had inspected the home and concluded that "[t]he house is appropriate for the child. . . And I met with him and met with his parents and there is a separate bedroom for KF in the house, that is set up for a small child, and I had even spoke to the grandparents and asked them how they felt about KF living with them and they were open to that and excited about the possibility."

Scott also testified that Farris stated that he had his own business, but had not yet provided documents to show income. She stated that he had resumed supervised visits since KF's emergency removal from the Thornburg/Jeska home on February 4, 2011. However, he still missed some visits and did not always timely notify DHS that he would not be able to attend. Ms. Donegan briefly continued her earlier testimony. In regard to Farris she stated that all his drug screens had been negative and that drug use by Farris was not a concern.

The court spoke of all three parents collectively when it stated that "The parents should comply with the Case Service Plan as to KF and [his half-sister], and certainly out of home placement is appropriate. They certainly can't go at this point with any of the parents because it

would create a substantial risk of harm." The court did not set forth any specific reasons why placement with Farris or his parents would create a substantial risk of harm.

> During the April 27, 2011 hearing, Farris, speaking to the court. stated:
> This is all a little too confusing for me, as to the way I have to prove myself to everyone, and I still went over and above to prove myself to each and everyone of you gentlemen. I missed things and, yes, I have not attended everything that I should have, but its – first off, it cost me over twenty-five dollars to make a round trip to and from every appointment that I have to follow. . . So I'm a little confused and I don't understand how in any way, shape or form they're going to know harm to my son, for him to be returned to me, when I didn't neglect him. *It had nothing to do with me*. (Emphasis added).

The court responded that "there's no request to terminate your rights. If anything, they're giving you an opportunity to prove that you should have your child back and I want you to have your child back. That's the plan." Mr. Farris responded "It's not in the plan" and the court told Farris's attorney to "please control your client." The court went on to advise all the parents that at the next hearing they should be ready to establish that they had complied with the case service plan "in all aspects" and that if they did not do so, "[y]ou know what's going to happen."

A termination petition as to all parents was filed on June 27, 2011.[3] A permanency planning hearing was scheduled for August 30, 2011. No testimony was taken and the court continued the orders in place until the termination hearing for all four children.

The termination hearing took place on multiple non-successive dates beginning on December 5, 2011. By the time the hearing had concluded on April 17, 2012, Farris had not been allowed unsupervised visitation with his son for well over two years and he had never been considered as a possible placement for his son following the February 2011 removal from the Thornburg/Jeska home.

Nearly all of the evidence presented at the hearing concerned Thornburg and Jeska. The evidence offered by the state in support of terminating Farris's parental rights was as follows:

- Farris had used drugs in the past and been convicted of two drug offenses, the most recent having been six years earlier. It was not disputed, however, that Farris had addressed his drug use and his convictions openly and honestly.
- The psychologist who administered Farris's psychological evaluation, testified that Farris had delayed participating in the evaluation, but did eventually appear and cooperate. He testified that MMPI testing showed the presence of some anti-social and narcissistic traits, but not enough to diagnose him with a personality disorder. He opined that these problems were "relatively straightforward" and recommended that Farris undergo

[3] In July, 2011 Farris's attorney filed a motion to withdraw which was heard on July 21, 2011. He indicated that he and Farris had had some disagreements regarding the case, but that the primary reason for the request was that he was withdrawing from the practice of law altogether. The court granted the motion and appointed Mr. Hickman as new counsel for Farris.

individual counseling for several months after which he believed that he would be able to parent KF;

- Testimony from DHS personnel that Farris had failed to attend many of the supervised visitations scheduled by DHS and his failure to do so caused emotional distress to his son.
- Farris failed to attend many of KF's counseling sessions as required by DHS until directed to by the court in January, 2012.
- Farris did not do the drug testing required by DHS, but did do all his drug testing for probation and his tests were all negative.
- Farris completed his anger management program. He had missed two of the sessions but completed four additional sessions to make it up.
- Farris was sometimes angry and argumentative with the DHS case manager, Jeannie Donegan. Ms. Donegan was the only witness to offer the opinion that Farris's parental rights should be terminated. She testified that in her opinion he did not benefit from the anger management training.

The therapist treating KF testified that KF and Dad were bonded. She also testified that Farris interacted well and appropriately with his son during visits. She agreed that Farris had failed to appreciate the degree to which inconsistent visitation had hurt his son, but that over the last several months he had been largely consistent and had demonstrated an increasing awareness. She testified that she did not believe termination of parental rights should be ordered.

ANALYSIS

The state initiated this matter to assure that KF's young half-siblings would receive the special medical care they required. Mr. Farris was not provided notice of the first several hearings. The first request made by his counsel was that he be allowed unsupervised visitation. This was denied despite the fact that there were no allegations that Farris had neglected or abused his son nor, indeed, that anyone else had. This denial was based in part on DHS's claim that Farris had tested positive on two drug tests, an assertion that the DHS finally admitted was untrue two years later.

The court eventually found grounds for taking jurisdiction based solely on Thornburg's admission that she had not provided adequate medical care to two of KF's half-siblings. No admissions were made of any neglect or abuse of KF. Indeed, no such allegations were made. Despite this, the court refused to place KF with his father or even permit unsupervised visitation. Farris and DHS staff verbally clashed over the terms and location of this supervised visitation.

As a result of Farris's lack of cooperation with DHS staffers, DHS recommended termination. Neither the evaluating psychologist nor KF's treating therapist recommended termination.

The court found three grounds for termination. First, under 19b(3)(c)(i) which provides for termination where "the conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." The majority properly concludes that this could not be applied to Mr. Farris since "none of the conditions that led to the adjudication continued to exist as it related to him."

Second, the court found grounds under 19b(3)(g) because there was clear and convincing evidence that "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." I strongly disagree. The child's social worker explicitly testified that termination of Farris's rights was not necessary and the evaluating psychologist implied the same in his testimony. More important, there was not a single piece of evidence that Mr. Farris had failed to provide proper care for his son prior to the time the court and DHS wrongfully deprived him of custody or at least unsupervised visitation. I agree that Mr. Farris's unwillingness to cooperate with DHS caused real harm to his son and that this must be weighed against his ability to provide care. However, despite the fact that he had never been accused of abusing or neglecting his son when he did have custody, DHS and the court refused to ever offer an opportunity to see whether he could do so after jurisdiction had been taken. I cannot agree that an unwillingness to cooperate with DHS alone is a basis for termination. The statute certainly does not so state. This is all the more so given that there was no basis whatsoever for the initial petition or adjudication as to KF by which Farris became subject to DHS discretion.

Moreover, Farris was never afforded an adjudicative trial. Even assuming that the circumstances were such that it was proper to deny placement with Farris initially, those circumstances cannot justify extinguishing his right to an adjudicatory trial, particularly in the absence of any neglect or abuse allegations as to Farris. While Thornburg was advised of a long series of rights she was giving up by admitting to three paragraphs in the petition, Farris neither received nor waived any of those rights. Under the one-parent doctrine, the at-fault parent receives substantial procedural protections but when she waives them, she waives them for the not-at-fault parent who has no right to object, let alone demand a trial.

I also cannot agree with the majority that there was clear and convincing evidence that KF would be harmed if returned to his father's care. The majority recites the general standard that failure to comply with the "family plan," i.e., the DHS directives, demonstrates a likelihood of harm. However, it does not even attempt to consider whether and how that general standard addresses the circumstances of this case.

This brings us to the issue of best interests of the child. Sadly, it has now been more than three years since Mr. Farris has been allowed custody of his son. His son has been living with a foster family for two years and is reportedly doing well. To now remove him from this family would likely cause a whole new round of trauma. It is precisely for this reason that the time to test Mr. Farris's fitness was at the outset of the case. Had he been found fit at that time, as he almost certainly would have been, he would have retained custody of his son and continuity would have been maintained for the child. Had he been found unfit, the court could have made a reasoned ruling not to grant custody with the knowledge that a foster care placement would likely be stable and long term unless the unfit parent changed greatly. Instead, the court allowed the child to remain with his mother, who had admitted allegations against her, while restricting the access of the father against whom there were no allegations, and after two years terminated the father's parental rights because he did not want to cooperate with DHS.

It is clear that Mr. Farris did not fully cooperate with DHS directives. However, I cannot agree, at least under the facts of this case, that he was afforded due process when his rights were terminated on that basis alone. Had Farris been found to have engaged in neglect or abuse in an adjudicative proceeding, I would agree that failing to comply with DHS directives and not benefitting from the programs would be a proper basis to terminate. However, there was *never* a showing that Mr. Farris needed any of the DHS services in order to be a fit parent. He was never determined to be an *unfit* parent until after being denied custody of his son for two years when his "non-cooperation" with the agency that advocated keeping the child from him was deemed a sufficient basis to call him "unfit." This case goes to the core of the problem with the one-parent doctrine and demonstrates the need to modify it.

I would reverse the termination of Farris's parental rights to KF.

/s/ Douglas B. Shapiro