

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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*In re* SMITH, Minors.

UNPUBLISHED

April 22, 2021

No. 353134

Wayne Circuit Court

Family Division

LC No. 2016-523212-NA

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

PER CURIAM.

Respondent appeals as of right the orders terminating her parental rights to her children, JS and JB, under MCL 712A.19b(3)(g) (failure to provide proper care or custody) and (j) (reasonable likelihood that the child will be harmed if returned to parent). For the reasons set forth in this opinion, we reverse and remand for further proceedings.

I. BACKGROUND

This case stems from the alleged physical abuse of respondent’s son JS by JS’s father.<sup>1</sup> On August 11, 2016, a petition was filed to terminate respondent’s parental rights to JS on the basis of an unfit home and her failure to protect JS. Children’s Protective Services (CPS) had received a referral regarding physical abuse on July 7, 2016, and the ensuing investigation had revealed that JS had been hospitalized for severe, life threatening injuries. Respondent indicated that she had left JS in the care of his father and that JS had injuries to his feet and head when father returned JS. Respondent sought medical attention for JS.

The trial court held a bench trial and took jurisdiction of JS. The trial court also held termination proceedings, at which the trial court found that petitioner had established statutory grounds to terminate respondent’s parental rights to JS. However, the trial court found that it was not in JS’s best interests to terminate respondent’s parental rights because testimony established

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<sup>1</sup> JS’s father is not a party to this appeal. His parental rights to JS have been terminated.

that respondent and JS were bonded and respondent played an important role in JS's medical care. Thereafter, the trial court dismissed the petition to terminate respondent's parental rights and ordered that the permanency plan was no longer adoption. Instead, the trial court changed the permanency plan to a guardianship. The trial court also stated on the record that respondent was to engage in certain services, including a psychological assessment, parenting classes,<sup>2</sup> maintaining legal income and suitable housing, and supervised visits.

Several months later, as the proceedings continued to progress in the trial court, respondent gave birth to JB. Following his birth, petitioner filed both a petition to terminate respondent's rights to JB and a supplemental petition to terminate respondent's parental rights to JS. Although we have been unable to locate either one of these petitions in the lower court file, we glean from the record testimony during the termination proceedings petitioner's contention that respondent failed to provide sufficient verification that she completed or benefited from the treatment plan was an important concern to petitioner that significantly influenced the decision to seek termination of respondent's parental rights to both JB and JS. The trial court took jurisdiction of JB and held termination proceedings regarding JS and JB. Following the termination proceedings, the trial court terminated respondent's parental rights to JS and JB. The trial court did so despite acknowledging, in response to an objection by respondent's counsel, that there was no treatment plan or order regarding a treatment plan with respect to respondent in the court file. In announcing its decision to terminate respondent's parental rights, the trial court reasoned in part, "She's learned nothing. There's no likelihood that she's going to change."

## II. ANALYSIS

Respondent argues that her due process rights to a fair proceeding were violated by petitioner's pervasive reliance on argument and evidence that respondent failed to comply with and benefit from a case service or treatment plan when respondent was never ordered to comply with a case service plan and there is no such plan in the court file. Petitioner concurs on appeal that respondent is entitled to relief on this ground, having filed a motion for peremptory reversal<sup>3</sup> in which petitioner acknowledged that respondent was never ordered to comply with a service plan and in which petitioner asked this Court to reverse the termination of respondent's parental rights and remand for purposes of properly allowing respondent to participate in services.<sup>4</sup>

"Whether proceedings complied with a party's right to due process presents a question of constitutional law that we review de novo." *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). "The interpretation and application of statutes and court rules are also reviewed de novo." *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

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<sup>2</sup> The trial court acknowledged that the respondent was already involved in parenting classes.

<sup>3</sup> We note, however, that petitioner did not file a brief in support of this motion and did not file any other brief in this appeal.

<sup>4</sup> We denied the motion for peremptory reversal. *In re Smith Minors*, unpublished order of the Court of Appeals, entered February 9, 2021 (Docket No. 353134).

“In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase.” *Sanders*, 495 Mich at 404. Generally, the adjudicative phase involves the court’s determination “whether it can take jurisdiction over the child in the first place.” *Id.* “Once a court assumes jurisdiction over a child, the parties enter the dispositional phase.” *Id.* at 406. “The purpose of the dispositional phase is to determine ‘what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult . . . .’” *Id.*, quoting MCR 3.973(A) (ellipsis in original). “If certain requirements are met, the court can terminate parental rights at the initial dispositional hearing; otherwise, the court continues to conduct periodic review hearings and may enter orders that provide for services, direct the child’s placement, and govern visitation.” *Sanders*, 495 Mich at 406-407 (citations omitted).

Generally, the Department “has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights.” *In re Hicks/Brown*, 500 Mich 79, 85; 893 NW2d 637 (2017).<sup>5</sup> “As part of these reasonable efforts, the Department must create a service plan outlining the steps that both it and the parent will take to rectify the issues that led to court involvement and to achieve reunification.” *Id.* at 85-86. The *Sanders* court noted that a case service plan must be prepared *before* an order of disposition can be entered:

Before the court enters any order of disposition, however, the DHS must prepare a case service plan that includes a “[s]chedule of services to be provided to the parent . . . to facilitate the child’s return to his or her home. . . .” MCL 712A.18f(3)(d). That case service plan must also “provide for placing the child in the most family-like setting available and in as close proximity to the child’s parents’ home as is consistent with the child’s interests and special needs.” MCL 712A.18f(3). The court examines the case service plan pursuant to MCL 712A.18f(4) and MCR 3.973(F)(2), and frequently adopts the DHS’s case service plan and orders compliance with the services contained in the plan. [*Sanders*, 495 Mich at 407.]

Here, the trial court initially decided not to terminate respondent’s parental rights to JS based on the trial court’s determination that termination was not in JS’s best interests and thereafter dismissed the petition to terminate respondent’s parental rights to JS, concluding that the goal would be a guardianship rather than adoption. Although the trial court orally referenced certain services for respondent, it is undisputed that the court file contains no service plan and that an order requiring respondent to comply with and benefit from a case service plan was never entered. The trial court acknowledged during the termination proceedings that the record was lacking in this respect. It also appears from the record that respondent engaged in at least some of the services referenced by the trial court. Presumably, when the court declined to terminate respondent’s parental rights, its intention was for respondent to remain a long-term presence in JS’s life consistent with the recommendation of his therapists. Thus, services could assist in insuring that respondent would be a stable figure in JS’s life as well as possibly prevent a future termination of her parental rights.

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<sup>5</sup> “Petitioner, however, is not required to provide reunification services when termination of parental rights is the agency’s goal.” *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009).

Nonetheless, when petitioner decided to change course and seek termination of respondent's parental rights to both JS and JB, petitioner relied heavily on contending that respondent had failed to comply and benefit from a nonexistent service plan in order to justify petitioner's actions in seeking termination of respondent's parental rights and to demonstrate evidentiary support for the statutory grounds warranting termination.

During these termination proceedings involving JS and JB, foster-care worker Jalen Robinson and CPS specialist Jasmin Wilson testified that respondent had not complied with or benefited from "the" treatment plan. The reason that was probably true is, again, there was no treatment plan.<sup>6</sup>

After the trial court recognized the lack of a service plan in the file, it appears that the trial court ruled in accordance with petitioner's responsive argument that services were not required since the goal was never reunification. Even if this is true, which is very difficult to ascertain given the unconventional and meandering procedural path of this case, the record is clear that respondent's so-called failure to comply with a nonexistent formal treatment plan was held against her in a substantial way that resulted in the termination of her parental rights. Because no treatment plan existed, respondent could not be faulted for failing to complete a nonexistent treatment plan. However, petitioner tried to salvage its case in the trial court by trying to have it both ways—faulting petitioner for not completing a treatment plan while simultaneously maintaining that no treatment plan was required. Thankfully, petitioner recognizes its error now on appeal. Such procedures are fundamentally unfair and cannot support the termination of respondent's fundamental right to parent her children.

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life . . . . When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. [*In re Rood*, 483 Mich at 91 (quotation marks and citation omitted).]

We therefore reverse the trial court's order terminating respondent's parental rights to JS and JB, and we remand this case to allow respondent to participate in services.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher  
/s/ Stephen L. Borrello  
/s/ Brock A. Swartzle

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<sup>6</sup> Because the trial court never entered an order for a treatment plan, it is unnecessary to review the testimony presented at the termination hearing as the testimony mostly related to how respondent failed to comply with a nonexistent treatment plan.