

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
December 6, 2012

In re MAYS, Minors.

No. 309577
Wayne Circuit Court
Family Division
LC No. 09-485821-NA

Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

MURRAY, P.J., (*concurring*).

Respondent father and his amicus curiae argue that his constitutional right to due process of law was violated when the trial court refused to place the children with him in the absence of a finding of harm or danger to the children in doing so. With respect to the procedural due process aspect of respondent’s argument,¹ I concur with the majority opinion that the statutory procedures in place under Michigan law adequately protect a parent from having children removed from their custody during the pendency of proceedings without adequate findings. However, for the reasons expressed briefly below, it is also evident that respondent’s substantive due process right was not violated given the evidence of record at the time the motion was decided on March 8, 2012.

As recognized by the majority and respondent, there is no dispute that a parent has a liberty interest in raising his child that is protected by the due process clause of the United States Constitution. US Const, Am XIV, § 1; *Smith v Org of Foster Families for Equality & Reform*, 431 US 816, 842-844; 97 S Ct 2094; 53 L Ed 2d 14 (1977). Respondent’s argument is that the trial court violated this constitutional right to due process of law (which he claims to be both procedural and substantive) by refusing to place the children with him during the pendency of the proceedings without first finding that he would be a danger to the children or otherwise

¹ The federal due process clause that applies to the States is contained in the Fourteenth Amendment to the United States Constitution, and provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]” US Const, Am XIV, § 1. Although the constitutional language only references process, *People v Sierb*, 456 Mich 519, 522-523; 581 NW2d 219 (1998), the United States Supreme Court has held that there is both a procedural and substantive part to the Fourteenth Amendment, see *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197; 761 NW2d 293 (2008).

committed abuse and neglect against the children. In making this argument respondent challenges this Court's decision in *In re CR*, 250 Mich App 185; 646 NW2d 506 (2002), where we held that once the circuit court acquires jurisdiction over the children it can order a parent to comply with certain orders and conditions, even if that parent was not a respondent in the proceedings, because jurisdiction over the children was established based on a plea by the other parent. *Id.* at 202-203. However, *In re CR* addresses an issue not presented by this case. As just noted, *In re CR* stands for the proposition that a non-respondent parent may be subject to court orders and conditions even when jurisdiction over the children is based exclusively on the other parent's conduct. The issue presented in this case is whether respondent may be deprived of the custody of his children during the pendency of these proceedings absent evidence of his particular unfitness. These are substantially different issues and therefore there is no basis in this case upon which to challenge the holding of *In re CR*.

Additionally, in light of the evidence presented to the trial court, it is readily apparent that the trial court's decision not to turn the children over to respondent did not violate his substantive due process right in the liberty interest he has as a parent as recognized by the United States Supreme Court. Specifically, the evidence presented showed that there was a significant factual question as to whether respondent had *any* contact with his children for a number of years prior to the February 24, 2012, hearing. At that hearing respondent testified that he most recently saw one child the previous month on her tenth birthday, and that he had seen both children "less than 10 times" in the year since his rights to the children were terminated. However, testifying directly to the contrary was his ten-year-old daughter, who testified that she did not see respondent on her tenth birthday and had not seen him in quite some time. Indeed, the child testified that she could not remember the last time she saw her father.

As a result of this testimony and the trial court's findings,² the liberty interest recognized by the due process clause as enunciated in *Stanley v Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972), is simply not applicable here. Indeed, the *Stanley* Court repeatedly emphasized that the interest that it was recognizing was "that of a man in the children he had sired *and raised*," and that the father "was entitled to a hearing on his fitness as a parent *before his children were taken from him . . .*" *Stanley*, 405 US at 649, 651. (Emphasis added.) See, also, *Stanley*, 405 US at 652 ("*Stanley's* [the father] interest in *retaining* custody of his children is cognizable and substantial.") and 405 US at 655 ("[N]othing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children."). (Emphasis added.) Indeed, the Court in *Lehr v Robertson*, 463 US 248, 260; 103 S Ct 2985; 77 L Ed 2d 614 (1983), quoting *Caban v Mohammed*, 441 US 380, 397; 99 S Ct 1760; 60 L Ed 2d 297 (1979) (STEWART, J., *dissenting*), recognized that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." (Emphasis in the original.)

² Though not as elaborate as they could be, one of the findings by the trial court in denying the motion was that although there is a presumption that a parent is fit, in the present case it did not apply because, since March 2009 when the case began and February 2012, the evidence revealed that respondent had either shown no interest in, or no ability to, parent the children.

Consequently, because there was a question about whether respondent had any contact or relationship with the two children at the time the trial court was asked to place the children with him, and because the children were not being “returned” or “taken from” respondent since he did not have custody of them, and because respondent had an opportunity to present evidence on this issue at the hearing held in February 2012, the liberty interest recognized in *Stanley* was neither applicable nor violated by the trial court’s decision. See *In re CAW (On Remand)*, 259 Mich App 181, 185; 673 NW2d 470 (2003).

For these reasons, I concur in the decision to affirm the trial court’s order.

/s/ Christopher M. Murray