

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of DAMIEN ALLEN CLARK,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

GREGORY CLARK,

Respondent-Appellant,

and

JANICE ANN LOWERY METHENY and
TREVOR ROBERT ARBOGAST,

Respondents.

UNPUBLISHED
March 13, 2008

No. 280251
St. Joseph Circuit Court
Family Division
LC No. 2006-000663-NA

Before: Fitzgerald, P.J., and Smolenski and Beckering, JJ.

PER CURIAM.

Respondent-appellant appeals as of right from the trial court order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(g). We affirm.

This matter commenced in July 2006 when a petition was filed seeking the removal of the child from the custody of the child's mother, alleging a suspicious burn to a sibling of the minor child, severe diaper rash on another sibling, and filthy and unsanitary conditions in the home where the mother and children resided.¹ The petition contained no allegations against respondent-appellant, who was a noncustodial parent. Respondent-appellant contends on appeal that he was denied due process because he was not appointed counsel at the initial adjudication, where jurisdiction over the children was asserted on the basis of the mother's plea to several allegations of the petition, or at subsequent review hearings. Respondent-appellant was appointed counsel on March 21, 2007, shortly after the foster care worker advised the court that

¹ The two siblings of the minor child are not respondent-appellant's children.

the child's mother appeared to have given up and that termination of her parental rights would be sought. A permanency planning hearing took place on June 7, 2007, and the trial court directed the petitioner to file a petition seeking the termination of parental rights on June 11, 2007. The termination petition was filed July 3, 2007, and the termination hearing took place on August 8, 2007.

The constitutional guarantees of due process and equal protection extend the right to counsel to respondents in termination proceedings. *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2001). Nevertheless, the "process that is due under the Fourteenth Amendment is not susceptible to precise definition and, therefore, must be determined on a case-by-case basis with reference to a particular situation by first considering the relevant precedents and then by assessing the several interests at stake." *In re Perry*, 148 Mich App 601, 615; 385 NW2d 287 (1986), citing *Lassiter v Dep't of Social Services of Durham County, North Carolina*, 452 US 18, 24-25; 101 S Ct 2153; 68 L Ed2d 640 (1981). This Court has held that there is no due process right to the assistance of court-appointed counsel at an adjudicative hearing. *In re Nash*, 165 Mich App 450, 458, 459; 419 NW2d 1 (1988). Rather, "before the right to appointed counsel arises in cases such as this, there must be a petition seeking the *permanent* custody of a child or an indication by the probate court that the termination of parental rights—if such an alternative was not previously considered—has become a possibility." *Id.* at 458.

An examination of the interests at stake and the relevant precedents reveals no due process violation. The constitutional sufficiency of the procedure may be tested by the balancing test set forth in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed2d 18 (1976):

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail.

A parent's right to care for his or her child is a liberty interest that is affected by child protective proceedings. *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001). However, respondent-appellant was not faced with the possible loss of that interest until termination was sought. We perceive no risk of an erroneous deprivation of the right where respondent-appellant was represented by counsel at the termination hearing. It does not appear that representation throughout the proceedings would have contributed to a more reliable determination, where respondent-appellant was advised by February 2007 of the steps he needed to take to gain custody but simply failed to follow through. The burden to the government of providing counsel appears to be primarily one of cost. Balancing all of these factors, no due process violation is apparent. When respondent-appellant's liberty interest in the care of his child was put at stake, i.e., when the termination petition was filed, he was already represented by counsel. Defendant was afforded due process. *Nash, supra* at 458, 459.

Respondent-appellant correctly notes, that under the court rules, he was not a "respondent" entitled to counsel during the earlier phases of these proceedings, and further contends that the failure of the court rules to treat him as a respondent violates his due process

guarantee. Because the initial petition contained no allegations against respondent-appellant, he was not a “respondent” as defined in MCR 3.903(C)(10) at the time of adjudication and at the review hearings that followed. Having already concluded that respondent-appellant was not denied due process by the lack of appointed counsel before March 21, 2007, we necessarily conclude that the court rules did not deny him due process by failing to designate him a “respondent” entitled to counsel before that time.

Respondent-appellant next challenges the sufficiency of the evidence for the termination of his parental rights. The trial court did not clearly err by finding that a statutory ground for termination of respondent-appellant’s parental rights was established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Respondent-appellant failed to provide proper care and custody for the minor child when he failed to visit him for over four months during these proceedings, explaining at trial that he dropped out of sight because he did not feel there was anything he needed to do because the child’s mother was doing her treatment. Before the child’s removal, respondent-appellant had been visiting him consistently for only two months, according to the child’s mother, or for five or six months, according to respondent-appellant. From 2000 to 2004, respondent-appellant came and went as he pleased. Even after he began to visit more consistently, he would have periods of four or five months when he did not visit. Thus, both before and during these proceedings, respondent-appellant has been a remarkably inconsistent presence in the life of this child. The trial court did not clearly err by finding that he failed to provide proper care and custody for him. MCL 712A.19b(3)(g).

The trial court also did not clearly err by finding no reasonable likelihood that respondent-appellant would be able to provide proper care and custody for the minor child within a reasonable time considering the age of the child. MCL 712A.19b(3)(g). Respondent-appellant has not obtained housing since his release from jail in January 2007, although he became employed February 7, 2007. He reported that his take-home income was \$500 per week and that he spent \$100 per week on rent at the home of his girlfriend’s mother and \$400 per week on food and cigarettes . He reported that he did not show up for a drug test in April 2007 because he did not have money for gas. Respondent-appellant does not have a driver’s license, after being caught driving on a suspended license. His license had been suspended for failure to pay a speeding ticket. Respondent-appellant failed to complete parenting classes, attending only one or two sessions. Respondent-appellant had two recent positive drug tests, in May and June 2007. We believe it is wholly reasonable to conclude, in light of respondent-appellant’s positive drug tests and his inability to pay basic expenses and to obtain housing despite a seemingly adequate income, that he continues to abuse substances at the expense of establishing stability for himself and the minor child. Therefore, the trial court did not clearly err by finding that there was no reasonable likelihood that he would be able to provide proper care and custody for Damien within a reasonable time considering his age. MCL 712A.19b(3)(g).

Respondent-appellant also claims on appeal that the trial court did not make adequate findings of fact and law as required by MCR 3.977(H). Although the bench opinion might not be ideal, the trial court did find that the statutory ground set forth in MCL 712A.19b(3)(g) was established by clear and convincing evidence and noted various facts demonstrating respondent-appellant’s continuing instability. We are satisfied that these findings and conclusions meet the requirements of MCR 3.977(H).

Finally, the trial court did not clearly err by finding that termination of respondent-appellant's parental rights was not clearly contrary to the best interests of the child. MCL 712A.19b(5). In counseling, Damien has been addressing issues of abandonment. He has repeatedly expressed that he would like to see respondent-appellant once in a while, but does not want to live with him. He indicated to his therapist that he would rather not live with respondent-appellant, because respondent-appellant would just go back to doing what he did before, i.e., using drugs. The record gives good reason to believe that the child's assessment is correct, since respondent-appellant had two recent positive drug screens and appeared inexplicably unable to meet basic expenses and obtain housing on a take-home income of approximately \$2,000 per month.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski
/s/ Jane M. Beckering