STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
December 6, 2012

In the Matter of MAYS, Minors.

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

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

PER CURIAM.

In this child protective proceeding case, respondent W. Phillips appeals a circuit court order, following a permanency planning hearing, that continued the minor children's placement in foster care and denied respondent's motion for placement of the children with him and dismissal of the trial court's jurisdiction. The order was entered during proceedings on remand after our Supreme Court reversed an order terminating respondent's parental rights.[1] *In re Mays*, 490 Mich 993; 807 NW2d 307 (2012). We affirm.

The Department of Human Services (DHS) filed a petition for temporary custody of the children in March 2009. The petition alleged that the children were living with their mother, respondent U. Mays, who had left them home alone, and that respondent had stated that he was unable to care for the children at that time and that their best placement would be with their grandmother. The court acquired jurisdiction over the children in April 2009 when respondent Mays entered a plea of admission to the allegations in the petition. The trial court held a dispositional hearing in May 2009. It continued the children in alternative placement and directed the parents to participate in reunification services.

In December 2009, the DHS filed a supplemental petition to terminate each parent's parental rights. Following a hearing, the trial court terminated the parents' parental rights.

[1] Although respondent initially filed a claim of appeal from the trial court's order, this Court, in response to a jurisdictional challenge in the children's brief on appeal, concluded that it lacked jurisdiction by right because the order was not a final order defined in MCR 3.993(A), but "that the claim of appeal is treated as an application for leave to appeal and leave to appeal is GRANTED." *In re Mays*, unpublished order of the Court of Appeals, entered July 25, 2012 (Docket No. 309577).

Although this Court affirmed that decision, *In re Mays*, unpublished opinion per curiam of the Court of Appeals, issued November 23, 2010 (Docket Nos. 297446, 297447), our Supreme Court subsequently reversed the order terminating respondent's parental rights, holding that "the trial court clearly erred in concluding that a statutory basis existed for termination of respondent's parental rights" and that the trial court erred in finding that termination was in the children's best interests when the factual record was inadequate to make a best interests determination. *In re Mays*, 490 Mich at 993-994.[2] Although the Supreme Court had previously directed the parties to address the constitutionality of the so-called "one parent" doctrine first adopted in *In re CR*, 250 Mich App 185; 646 NW2d 506 (2002), the Court ultimately declined to consider that issue because respondent had not raised it in his appeal to this Court. *In re Mays*, 490 Mich at 994.

Once the case returned to the trial court, respondent filed a motion for termination of the court's jurisdiction over the children or to return the children to his custody. He argued that the trial court had violated his due process rights when it utilized the one parent doctrine recognized in *In re CR* to take jurisdiction over the children because it deprived him of custody without a determination of unfitness. The trial court disagreed and denied the motion.

Respondent now argues on appeal that the trial court's continued exercise of jurisdiction over the children based solely on respondent Mays' plea, without an adjudication of unfitness with respect to him, violates his constitutional right to due process. After de novo review of this constitutional issue, we disagree. See *County Rd Ass'n of Mich v Governor*, 474 Mich 11, 14; 705 NW2d 680 (2005).

The concept of due process is flexible, and analysis of what process is due in a particular proceeding depends on the nature of the proceeding, the risks involved, and the private and governmental interests that might be affected. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993). "The essence of due process is fundamental fairness." *In re Adams Estate*, 257 Mich App 230, 233-234; 667 NW2d 904 (2003) (internal quotation marks and citation omitted). Procedural due process requires that a party be provided notice of the nature of the proceedings and an opportunity to be heard by an impartial decision maker at a meaningful time and in a meaningful manner. *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). The opportunity to be heard requires a hearing at which a party may know and respond to the evidence. *Hanlon v Civil Serv Comm*, 253 Mich App 710, 723; 660 NW2d 74 (2002).

"[P]arents have a significant interest in the companionship, care, custody, and management of their children. This interest has been characterized as an element of 'liberty' to be protected by due process." *In re Brock*, 442 Mich at 109. A parent's interest in his children "warrants deference and, absent a powerful countervailing interest, protection." *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972). Conversely, the state has a legitimate interest in protecting children who are neglected or abused by their parents. *Id*. at 652; *In re VanDalen*, 293 Mich App 120, 132-133; 809 NW2d 412 (2011). But "so long as a parent adequately cares for his . . . children (*i.e.*, is fit), there will normally be no reason for the State to

[2] In a separate order, the Supreme Court also reversed the termination of respondent Mays' parental rights. *In re Mays*, 490 Mich 997; 807 NW2d 304 (2012).

inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel v Granville*, 530 US 57, 68-69; 120 S Ct 2054; 147 L Ed 2d 49 (2000). A parent is constitutionally entitled to a hearing on his fitness before his children are removed from his custody. *Stanley*, 405 US at 658. "A due-process violation occurs when a state-required breakup of a natural family is founded solely on a 'best interests' analysis that is not supported by the requisite proof of parental unfitness." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003).

Child protective proceedings are initiated by the filing of a petition. MCR 3.961(A). A petition is a complaint alleging "that a parent, guardian, nonparent adult, or legal custodian has harmed or failed to properly care for a child[.]" MCR 3.903(A)(20). "[T]he parent, guardian, nonparent adult, or legal custodian who is alleged to have committed an offense against a child" is a respondent. MCR 3.903(C)(10). An offense against a child is "an act or omission by a parent, guardian, nonparent adult, or legal custodian asserted as grounds for bringing the child within the jurisdiction of the court" under MCL 712A.2(b). MCR 3.903(C)(7).

The procedures outlined by the Juvenile Code and the court rules protect a parent's due process rights. They permit the court to issue an order to take a child into custody when a judge or referee finds from the evidence "reasonable grounds to believe that conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child." MCR 3.963(B)(1). Once the child is taken into custody, the parent must be notified and advised "of the date, time, and place of the preliminary hearing," which is to be held within 24 hours after the child has been taken into custody, and a petition is to be prepared and submitted to the court. MCR 3.921(B)(1); MCR 3.963(C); MCR 3.965(A)(1). If the child is in protective custody when the petition is filed, the procedures afforded at the preliminary hearing provide due process to the respondent-parents. They are informed of the charges against them and the court may either release the child to the respondent-parents or order alternative placement. MCR 3.965(B)(4) and (12)(b). Before ordering alternative placement, "the court shall receive evidence, unless waived, to establish that the criteria for placement . . . are present. The respondent shall be given an opportunity to cross-examine witnesses, subpoena witnesses, and to offer proof to counter the admitted evidence." MCR 3.965(C)(1). Thus, the respondent-parents are given notice of the proceedings and an opportunity to be heard before the child can remain in protective custody.

For the court to continue the child in alternative placement and "exercise its full jurisdiction authority," it must hold an adjudicatory hearing at which the factfinder determines whether the child comes within the provisions of § 2(b). *In re MU*, 264 Mich App 270, 278; 690 NW2d 495 (2004); *Ryan v Ryan*, 260 Mich App 315, 342; 677 NW2d 899 (2004). Generally, the determination whether the allegations in the petition are true, thus allowing the court to exercise jurisdiction, is made from the respondent's admissions to the allegations in the petition, from other evidence if the respondent pleads no contest, or from evidence introduced at a trial if the respondent contests jurisdiction. MCR 3.971; MCR 3.972; MCR 3.973(A); *In re PAP*, 247 Mich App 148, 152-153; 640 NW2d 880 (2001). "The procedural safeguards used in adjudicative hearings protect parents from the risk of erroneous deprivation of their liberty interest in the management of their children." *Id*. at 153. Once jurisdiction is obtained, the case proceeds to disposition "to determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult . . . ." MCR 3.973(A).

There is no dispute that respondent was provided with the procedural safeguards prior to the adjudication. However, he was never adjudicated unfit; only respondent Mays was adjudicated as unfit. This Court upheld the validity of this practice in *In re CR*, in which it held that "[t]he family court's jurisdiction is tied to the children" and thus the petitioner is not required "to file a petition and sustain the burden of proof at an adjudication with respect to every parent of the children involved in a protective proceeding before the family court can act in its dispositional capacity." *In re CR*, 250 Mich App at 205. This Court further observed that if the trial court acquires jurisdiction by a plea from one parent, the court can take measures "against any adult," MCR 3.973(A), and order the nonadjudicated parent to engage in services without alleging and proving that the nonadjudicated parent was abusive or neglectful as provided under § 2(b).[3] *Id*. at 202-203.

The essence of respondent's argument on appeal is that the one parent doctrine violates the nonadjudicated parent's due process rights by depriving him of custody of his children without a determination that he is an unfit custodian, as would be established at the adjudicatory hearing. Respondent's argument conflates the adjudicatory and dispositional phases of the proceedings. The adjudicatory phase determines whether a child requires the protection of the court because he or she comes within the parameters of § 2(b). If the child comes within the scope of § 2(b), the trial court acquires jurisdiction and "can act in its dispositional capacity." It is at the dispositional hearing that the court determines "what measures [it] will take with respect to a child properly within its jurisdiction[.]" MCR 3.973(A). It can issue a warning to the parents and dismiss the petition, MCL 712A.18(1)(a), place the child in the home of a parent or a relative under court supervision, MCL 712A.18(1)(b), or commit the child to the DHS for placement, MCL 712A.18(1)(d) and (e). Before the court determines what action to take, the DHS must prepare a case service plan, MCL 712A.18f(2), and the court must "consider the case service plan and any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, relative with whom the child is placed, lawyer-guardian ad litem, attorney, or guardian ad litem; and any other evidence offered, including the appropriateness of parenting time, which information or evidence bears on the disposition." MCL 712A.18f(4). See, also, MCR 3.973(E)(2) and (F)(2). If the DHS recommends against placing the child with a parent, it must "report in writing what efforts were made to prevent removal, or to rectify conditions that caused removal, of the child from the home," MCR 3.973(E)(2), and identify the likely harm to the child if separated from or returned to the parent. MCL 712A.18f(1)(c) and (d). The parent is entitled to notice of the dispositional hearing, MCR 3.921(B)(1)(d), and the parties are entitled to an opportunity "to examine and controvert" any reports offered to the court and to "cross-examine individuals making the reports when those individuals are reasonably available." MCR 3.973(E)(3).

If the child is removed from the home and remains in alternative placement, the court must hold periodic review hearings to assess the parents' progress with services and the extent to which the child would be harmed if he or she remains separated from, or is returned to, the parents. MCL 712A.19(3) and (6); MCR 3.975(A) and (C). The court must "determine the

[3] This is what is known as the so-called "one parent doctrine."

continuing necessity and appropriateness of the child's placement" and may continue that placement, change the child's placement, or return the child to the parents. MCL 712A.19(8); MCR 3.975(G). Before making a decision, the court must "consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing." MCR 3.975(E). If the child remains out of the home and parental rights have not been terminated, the court must hold a permanency planning hearing within 12 months from the time the child was removed from the home and at regular intervals thereafter. MCL 712A.19a(1); MCR 3.976(B)(2) and (3). The purpose of the hearing is to assess the child's status "and the progress being made toward the child's return home[.]" MCL 712A.19a(3). At the conclusion of the hearing, the court "must order the child returned home unless it determines that the return would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child." MCR 3.976(E)(2). See, also, MCL 712A.19a(5). In making its determination, "[t]he court must consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing." MCR 3.976(D)(2). Further, "[t]he parties must be afforded an opportunity to examine and controvert written reports received by the court and may be allowed to cross-examine individuals who made the reports when those individuals are reasonably available." *Id*. As with the initial dispositional hearing, each parent is entitled to notice of the dispositional review and permanency planning hearings and an opportunity to participate therein. MCR 3.920(B)(2)(c); MCR 3.975(B); MCR 3.976(C).

These provisions, taken together, satisfy the requirements of due process. The parent is entitled to notice of the dispositional hearing and an opportunity to be heard before the court makes its dispositional ruling. When it is recommended that the child not be placed with a parent, the court must consider whether the child is likely to be harmed if placed with the parent, which would necessarily entail a determination regarding that parent's fitness as a custodial parent. Once the court determines that the child should not be placed with the parents, it may continue the child in alternative placement or return the child to the parents depending on the circumstances of the parents and the child, again considering whether the child is likely to be harmed if placed with the parent, which would necessarily entail a determination regarding that parent's fitness as a custodial parent. Respondent does not contend that these procedures were not followed here.

Accordingly, the trial court did not violate respondent's due process rights by continuing to exercise jurisdiction over the children without subjecting respondent to an adjudication.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

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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