

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of M.Y.R., A.C.R., A.D.R., JR.,
T.D.W., J.J.W., A.L.P., and L.G.P., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

TAMARA SIMONE SMART, a/k/a TAMARA
SOMONE SMART, a/k/a TAMARA SAMONE
SMART,

Respondent-Appellant,

and

AARON RICHARDSON, LEO RANDOLPH,
FRANKIE WEAR, and ANDREW LAMAR
PALMER,

Respondents.

In the Matter of A.L.P. and L.G.P., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ANDREW LAMAR PALMER,

Respondent-Appellant,

and

UNPUBLISHED
October 14, 2004

No. 253779
Wayne Circuit Court
Family Division
LC No. 01-400128

No. 253962
Wayne Circuit Court
Family Division
LC No. 01-400128

TAMARA SIMONE SMART, a/k/a TAMARA
SOMONE SMART, a/k/a TAMARA SAMONE
SMART, AARON RICHARDSON, LEO
RANDOLPH, and FRANKIE WEAR,

Respondents.

In the Matter of T.D.W. and J.J.W., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

FRANKIE WEAR,

Respondent-Appellant,

and

TAMARA SIMONE SMART, a/k/a TAMARA
SOMONE SMART, a/k/a TAMARA SAMONE
SMART, AARON RICHARDSON, LEO
RANDOLPH, and ANDREW LAMAR PALMER,

Respondents.

No. 253964
Wayne Circuit Court
Family Division
LC No. 01-400128

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

In these consolidated appeals, respondents-appellants appeal as of right from the trial court order terminating their parental rights to their respective children pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). We affirm.

All three respondents-appellants challenge the sufficiency of the evidence establishing the statutory grounds for the termination of their parental rights. The trial court did not clearly err by finding that statutory grounds for termination were established by clear and convincing evidence. See MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The trial court's findings are clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Terry*, 240 Mich App 14, 21-22; 610 NW2d 563 (2000).

The primary condition of adjudication relating to respondent-appellant Smart was her failure to protect one of her children from sexual abuse. The evidence clearly supported the trial court's conclusion that respondent-appellant Smart's inability to protect the children continued to exist at the time of the termination trial. Although respondent-appellant Smart engaged in therapy, the evidence indicated that she failed to understand her responsibility to protect the children. The May 2002 report of respondent-appellant Smart's therapist, some nine months after the order of disposition, states that she "continues to maintain that given the fact that the police officially closed the case, from a legal standpoint, the case bears no additional discussion." Her most recent therapist testified that respondent-appellant has not accepted responsibility for the children coming into care, has no insight into her failure to protect them, and does not know how she can protect them.¹ Respondent-appellant Smart's abdication of responsibility for abuse of the children while in her custody presents strong evidence that she will not be able to adequately protect them in the reasonable future.

The condition of adjudication relating to respondent-appellant Wear was his absence and his failure to support his minor children. The evidence indicated that respondent-appellant Wear continued to fail to support the children throughout the pendency of this case and did not visit them for more than a year. Respondent-appellant Wear's conduct throughout the pendency of this matter is especially relevant in light of the Clinic for Child Study, which recommended that respondent-appellant Wear visit the children regularly and noted that his level of involvement in their lives would serve as a good indicator of his sincerity. The trial court did not clearly err by finding that respondent-appellant Wear's absence from the lives of the children would not be rectified in the reasonable future.

Termination of the parental rights of all three respondents-appellants was appropriate pursuant to MCL 712A.19b(3)(g). Respondent-appellant Smart clearly failed to provide proper care and custody for the children by failing to protect them from sexual abuse. The same evidence establishing that the conditions of adjudication relating to respondent-appellant Smart continued to exist and will not be rectified in the reasonable future equally establishes that there is no reasonable likelihood that she will be able to provide proper care and custody for the children within a reasonable time. In addition, the evidence at the termination trial indicated that respondent-appellant Smart lacks stable employment and housing and did not consistently attend therapy. Given respondent-appellant Smart's lack of progress on these important aspects of the parent agency agreement over the twenty months between the initial disposition and the filing of the petition for termination, the trial court was justified in concluding that she would not be able to provide proper care and custody for the children in the reasonable future.

Respondent-appellant Wear failed to provide proper care and custody for his children by failing to support or visit them since they turned three, which occurred six months before the

¹ This conclusion is reinforced by respondent-appellant Smart's own testimony at the termination trial. When asked whether there was anything she could have done to prevent the sexual abuse of her child, respondent replied, "I was at work," apparently implying that she therefore could not have prevented the injury. This testimony is particularly revealing in light of her earlier plea of no contest to allegations of a previous referral concerning sexual abuse of the same child.

adjudication in this matter. Once again, the evidence establishing that the conditions of adjudication continued to exist and would not be rectified in the reasonable future equally establishes that there is no reasonable likelihood that respondent-appellant Wear will be able to provide proper care and custody for the children within a reasonable time. His failure to support or visit the children for over a year prior to the filing of the termination petition is substantial evidence that he will not do so in the reasonable future. In addition to failing to visit the children for most of the pendency of this case, respondent-appellant Wear also failed to provide any evidence of his participation or progress in therapy. Based upon this evidence, one is not left with the impression that the trial court made a mistake by determining that there was no reasonable likelihood that respondent-appellant Wear would be able to provide proper care and custody for the children in the reasonable future. See *Terry, supra*.

Respondent-appellant Palmer also failed to provide proper care and custody for his children by remaining out of contact with the worker with his whereabouts unknown during much of the pendency of this matter. Respondent-appellant Palmer's complete failure to participate in his treatment plan is convincing evidence that he will not be able to provide the children with proper care and custody in the reasonable future. See *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003). That evidence, together with evidence strongly suggesting that respondent-appellant Palmer was the perpetrator of sexual abuse on one or more of respondent-appellant Smart's children, supplies more than adequate proof that respondent-appellant Palmer will not be able to provide proper care and custody for the children within a reasonable time. The trial court did not clearly err in so finding.

The trial court also did not clearly err by terminating respondent-appellant Smart's parental rights on the ground that the children would be harmed if returned to her care, MCL 712A.19b(3)(j), given her continuing inability to protect the children. The trial court also did not clearly err by finding a reasonable likelihood that the children would be harmed if returned to respondent-appellant Palmer, who was identified as a perpetrator of sexual abuse. Wear's children both stated that they had seen "Andrew's" penis, and both children showed physical evidence of sexual assault. The trial court was entitled to judge the credibility of respondent-appellant Palmer's testimony, which included the assertion that he was never alone with the children even though he had lived with respondent-appellant Smart. See *Miller, supra*. Respondent-appellant Palmer's treatment of respondent-appellant Smart's children is probative of how he would treat his own children. *In re Powers*, 208 Mich App 582, 591-592; 528 NW2d 799 (1995). The evidence that respondent-appellant Palmer was a perpetrator of sexual abuse against children, together with evidence that he lacked stable employment or housing and failed to demonstrate any commitment to his own children by participating in the treatment plan, was sufficient to support the trial court's conclusion that the children would be harmed if returned to him. We are not left with the impression that the trial court erred by so finding. See *Terry, supra*.

Although the trial court relied on MCL 712A.19b(3)(c)(i) and (j) to terminate the parental rights of all three respondents-appellants, statutory subsection (j) does not appear applicable to respondent-appellant Wear. Although he may be responsible for failing to protect the children

by virtue of the fact that they were harmed while he remained absent from their lives, the crux of the allegations against him was not abuse or failure to protect, but abandonment.² Also, statutory subsection (c)(i) does not appear to be an appropriate ground for the termination of respondent-appellant Palmer's parental rights to his children, and we do not affirm termination of his parental rights under this provision. However, reversal is not warranted because termination of parental rights need be based on only one statutory ground. See *In re SD*, 236 Mich App 240, 247; 599 NW2d 772 (1999).

Furthermore, the trial court did not clearly err by finding that termination was not clearly contrary to the best interests of the children. MCL 712A.19b(5). Although some evidence showed that respondent-appellant Smart was strongly bonded with the children, the evidence was also clear that at least three of the children had suffered grievous abuse and respondent-appellant Smart continued to lack the ability to protect the children. While respondent-appellant Wear indicated that he wished to plan for his children, he did not demonstrate any commitment to them, as evidenced by his failure to visit and to supply evidence of the therapy required by the parent agency agreement. There was substantial evidence that respondent-appellant Palmer was the perpetrator of sexual abuse against children, as we have already noted. Further, he completely failed to participate in the parent agency agreement and remained out of contact with the agency with unknown whereabouts during much of this case, exhibiting no commitment to the care of his children. On the whole record, we are not left with an impression that termination of the parental rights of the three respondents-appellants was clearly contrary to the best interests of the children.

Respondent-appellant Wear also asserts on appeal that he was denied due process by lack of proper notice of proceedings and by the trial court's refusal to adjourn the termination trial to allow him to testify. Respondent-appellant's claims of lack of notice were not raised in the trial court. We therefore review these claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"A procedural due process analysis requires a court to consider '(1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient.'" *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001), quoting *Jordan v Jarvis*, 200 Mich App 445, 448; 505 NW2d 279 (1993), citing *Dep't of Corrections v Thompson*, 490 US 454, 460; 109 S Ct 1904; 104 L Ed 2d 506 (1989). A parent's right to care for his or her children is undeniably a liberty interest that is affected by child protective proceedings. *In re Render*, 145 Mich App 344, 348; 377 NW2d 421 (1985). As noted by this Court in *In re AMB*, *supra*, 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 Ed 2d 18 (1976):

Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be

² The petitioner sought termination of respondent-appellant Wear's parental rights under MCL 712A.19b(a)(ii) (desertion for 91 days), but the trial court did not rely on this statutory ground.

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.

The record indicates that notice of the adjudication hearing was actually accomplished by publication more than fourteen days before the adjudication hearing. Although failure to provide notice of termination proceedings by personal service as required by MCL 712A.12 is normally a jurisdictional defect that renders proceedings in the family court void as to the individual who was deprived of service, *Terry, supra* at 21, substituted service may be done by registered mail or by publication if the judge is satisfied that it is impracticable to personally serve such notice. MCL 712A.13. Substituted service is sufficient to confer jurisdiction over a party. *In re Mayfield*, 198 Mich App 226, 231; 497 NW2d 578 (1993). The record indicates that personal service was attempted on respondent-appellant Wear in Cleveland, Ohio, on three occasions. Service by certified mail was also attempted.³ The trial court's determination that reasonable efforts were made to locate respondent-appellant Wear, and the court's provision of notice by publication, present no plain error affecting the substantial rights of respondent-appellant Wear. See *Carines, supra*.

Respondent-appellant Wear also claims denial of due process because of lack of notice of a dispositional review hearing, which was apparently rescheduled by way of a card sent to counsel. Neither respondent-appellant Wear nor his attorney were present at this hearing, although counsel for petitioner, for respondent-appellant Smart, and for the three other respondent fathers were present. Since respondent-appellant Wear previously received notice by way of substituted service, had appeared before the court, and was represented by counsel, subsequent notices could be served in writing upon his attorney. MCR 3.920(F). Respondent-appellant did not raise this issue in the lower court and no record was made concerning whether respondent-appellant's counsel received written notice of the rescheduled hearing. Even assuming lack of proper notice, we conclude that respondent-appellant Wear's substantial rights were not affected. Where the overwhelming fact leading to the termination of respondent-appellant Wear's parental rights was his failure to visit the children for over a year prior to the filing of the termination petition, it appears extremely unlikely that respondent's or his counsel's presence at this dispositional review hearing would have affected the outcome of this matter. See *Carines, supra*.

Finally, respondent-appellant Wear asserts that he was denied due process by the trial court's refusal to grant an adjournment so that he could testify at the termination trial. The trial court's failure to grant an adjournment did not deprive respondent-appellant of due process.

³ The trial record does not contain an affidavit concerning attempts to locate respondent-appellant Wear, nor was testimony taken on this subject, as contemplated by court rule. MCR 3.920(B)(4)(b). However, the constitutional parameters for adequate notice are defined by statute, not by court rule. *In re Mayfield*, 198 Mich App 226, 230; 497 NW2d 578 (1993); *In re Brown*, 149 Mich App 529, 540; 386 NW2d 577 (1986).

Respondent-appellant Wear was represented by counsel throughout the termination trial. MCR 3.973(D)(2) and (3), relating to the dispositional phase, state that “[t]he respondent has the right to be present *or may appear through an attorney*” and that “the court may proceed in the absence of parties provided that proper notice has been given.” It appears extremely unlikely that the risk of an erroneous deprivation was increased by respondent’s absence and his inability to offer testimony, where the overwhelming fact leading to the termination of respondent Wear’s parental rights was his failure to visit the children for more than a year prior to the filing of the termination petition. Although a further adjournment for respondent-appellant’s testimony may not have been an onerous burden on the trial court, when considered in light of the miniscule likelihood that such testimony could have altered the outcome of the trial the denial of the request for adjournment did not constitute a denial of due process.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter