

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of SAMANTHA LYN KNIGHT and
SYDNEY JOE KNIGHT, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MELINDA ANN KURKOWSKI,

Respondent-Appellant.

UNPUBLISHED

May 13, 2010

No. 293889

Oakland Circuit Court

Juvenile Division

LC No. 06-723442-NA

Before: CAVANAGH, P.J., AND O'CONNELL AND WILDER, JJ.

PER CURIAM.

Respondent mother appeals as of right from an order that terminated her parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). We affirm.

The trial court did not clearly err in finding that the statutory grounds for termination of respondent's parental rights were established by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). The children were brought into care in July 2006 after Sydney was taken to the doctor for a yeast infection. The doctor suspected sexual abuse. Sydney revealed to the worker and the Care House interviewer that respondent's live together partner, Matthew, Bailey had been physically and sexually abusing her. In addition to the claims of abuse, the petition seeking temporary custody also alleged medical neglect on the part of the father, Joe Knight, a history of domestic abuse between respondent and Knight, and Knight's criminal history. Respondent appeared at an August 1, 2006, pre-trial hearing in which Knight pleaded no contest to the allegations in the petition. Respondent, who did not believe the allegations, requested a separate adjudication hearing. The trial court denied the request, finding that it already had jurisdiction over the child based on Knight's plea. The matter proceeded to disposition and respondent was ordered to comply with the parent-agency agreement (PAA). The PAA was later modified to provide that respondent discontinue her relationship with Bailey and find housing apart from Bailey. Respondent obtained separate and appropriate housing and appeared to be making substantial progress. However, it came to the worker's attention that respondent was not living in the separate residence but continued to live with Bailey. A detective went to respondent's home over a period of two weeks, stopping at all hours of the day and night. Respondent's vehicle was never there and the lights were never on. She did not register any water usage. Meanwhile, respondent's vehicle was spotted at Bailey's house at all

hours of the day and night. When confronted with this information, respondent changed her approach to the case. Instead of complying with the PAA, respondent declared that she had no intention of leaving Bailey because she believed the allegations against him were false.

Respondent argues that she should have been afforded a separate adjudication hearing. However, pursuant to *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2002), a trial court may assert jurisdiction over a child based on findings made against only one parent. This Court held that

the court rules simply do not place a burden on a petitioner like the FIA 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. The family court's jurisdiction is tied to the children making it possible to terminate parental rights even of a parent who, for one reason or another, has not participated in the protective proceeding under proper circumstances. [*Id.*]

However, the Court went on to note:

[There is a] problem of holding an adjudication against only one parent and then proceeding to terminate two parents' parental rights at the same proceeding. This process can be quite confusing. The parent who has been subject to an adjudication [] can have her parental rights terminated on the basis of all the relevant and material evidence on the record, including evidence that is not legally admissible. In contrast, the petitioner must provide legally admissible evidence in order to terminate the rights of the parent who was not subject to an adjudication. [*Id.*]

Knight was the one who took Sydney to the doctor who believed that Sydney had been sexually abused. Knight was also the one who took the girls to their Care House interviews and heard Sydney tell Amy Allen that she had been physically and sexually abused by Bailey. This, along with his acknowledgement of prior CPS and domestic abuse, allowed the court to properly assert jurisdiction over the children. The trial court then had the authority to order respondent to comply with her PAA, which ultimately included provisions that she end her relationship with Bailey and locate and maintain safe and suitable housing without Bailey. Thus, the ultimate question at the termination hearing was not whether the abuse had taken place, but whether respondent was in compliance with her PAA. The supplemental petition does not provide new allegations that would constitute new grounds for termination of parental rights.

In addition, even if only admissible evidence was permitted, the result would be the same. The trial court conducted an MCR 3.974(C) evidentiary hearing in order to determine the admissibility of statements the children made to Amy Allen of Care House regarding the alleged abuse and found that testimony regarding the Care House interviews was admissible. Respondent does not argue that the decision was improper, only that Sydney was not worthy of belief. Any questions of credibility and the weight to be afforded evidence are best left to the trier of fact, who was in a position to judge the witnesses' demeanor and testimony. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 455 NW2d 161 (1989).

Even respondent's therapist acknowledged that respondent's deception was her tacit acknowledgment that her continued relationship with Bailey was not proper. Respondent's successful completion of parenting classes, her active participation in individual counseling, appropriate visits, and her new job amounted to nothing where she would not take the most basic step of separating herself from Bailey. Respondent admitted that she knew if she chose to remain with Bailey she would lose her children:

Q. Do you view it as a choice you're making that you're putting your or Matt's needs above your girls at all? Do you look at it like that in any way?

A. No.

Q. Has anyone ever framed it to you in that way?

A. Yes.

Q. Who?

A. I believe Dawn Dwyer did.

Q. Your children's therapist and your family therapist?

A. Uh-huh.

Q. Mr. Kindermann [respondent's therapist], he testified about talking about choices and consequences of your choices. Did he ever frame consequences or choices with staying with Mr. Bailey with you?

A. Not really.

Q. Not really?

A. I mean we – we talked about the fact of what would happen if I held my ground with this county and what the likely outcome would be

Q. And what did you discuss as the likely outcome?

A. That my rights would be terminated.

If respondent was unable to place the needs of her children before Bailey, it was unlikely that she would be able to protect them in the future. For that reason, clear and convincing evidence existed to support termination of respondent's parental rights pursuant to MCL 712A.19b(3)(c)(i), (g), and (j).

Having found the foregoing subsections proven by clear and convincing evidence, the trial court then had to make an affirmative finding that termination of respondent's rights was in the children's best interests. MCL 712A.19b(5). Both girls, even at their very young ages, suffered from emotional and behavioral problems. They enjoyed visiting with their mother, but they consistently stated that they feared Bailey and did not want to be returned to respondent's

care for fear that they would be exposed to Bailey once again. Whether these fears were well grounded is beside the point. Even knowing how her children felt about Bailey and even knowing that it was part of her PAA to separate herself from him, respondent was steadfast in her decision to remain with Bailey. Her decision placed her needs above her children's needs. The children were entitled to permanence and stability.

Respondent next argues that her due process rights were violated because the hearing on the supplemental petition was not timely. MCR 3.977 provides that a "hearing on a supplemental petition for termination of parental rights under this subrule must be held within 42 days after the filing of the supplemental petition. The court may, for good cause shown, extend the period for an additional 21 days." The supplemental petition seeking termination of respondent's parental rights was filed on September 5, 2007. Respondent made a judge demand on September 6, 2007. The matter was set to go to trial on February 25, 2008, but did not begin until June 5, 2008, due to the court's schedule. At the close of the June 5, 2008, hearing, the trial court attempted to give the parties a date to continue the matter. Respondent's counsel was not available on the date given by the court. When the hearing resumed on September 22, 2008, respondent's attorney renewed his motion to dismiss based on the delay. The trial court denied the motion to dismiss, disagreeing that the delay resulted in a de facto termination of respondent's parental rights. The best interests hearing took place on May 27, 2009, and July 29, 2009. The motion to adjourn the prosecutor's case in chief was granted to allow psychological evaluations to be performed.

It is clear from the record that the matter was not heard in a timely manner. However, more than one delay was attributable to respondent. She made a judge demand, which resulted in working around the judge's already full docket. Additionally, when given the opportunity to come back to trial the following week, respondent's attorney had a conflict. Failure to hold the hearing within the prescribed time does not divest the court of jurisdiction where the rule contains no authority to impose a sanction of dismissal. MCR 3.977; *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993); *In re Kirkwood*, 187 Mich App 542, 546; 468 NW2d 280 (1990).

Thus, it is clear that there was no remedy available to respondent for the delay in bringing the matter to trial. Because she was offered a chance to present a case in her favor, it could not be said that she was denied due process. It is true that the two-year period in which respondent did not visit the children resulted in the likely disintegration of the bond between them, but that separation was the result of respondent's choice to remain with Bailey. Therefore, even though the matter was not timely heard, there is no remedy provided and the trial court did not err in failing to dismiss the action.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder