

STATE OF MICHIGAN  
COURT OF APPEALS

---

*In re* C HUNT, Minor.

UNPUBLISHED  
March 8, 2016

No. 327453  
St. Clair Circuit Court  
Family Division  
LC No. 14-000202-NA

---

Before: SERVITTO, P.J., and SAAD and O'BRIEN, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating her custodial parental rights to the minor child, CH, under MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist); (g) (failure to provide proper care or custody); and (j) (reasonable likelihood, based on conduct or capacity of custodian, that child will be harmed if returned home). We vacate the trial court's termination order and remand for further proceedings consistent with this opinion.

In this matter, the trial court removed the minor child from her custodial home with respondent, as authorized by the Juvenile Code, due to respondent's neglect and mental health issues. MCL 712A.2(b)(1) provides the family division of a circuit court with the authority and jurisdiction in proceedings concerning a juvenile under 18 years of age within the county "[w]hose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship."

At the outset, we must point out that respondent is the minor child's aunt, who was awarded legal and physical custody of the child on August 29, 2013, in a Westmoreland County, Pennsylvania court order. She is thus the child's legal custodian. See MCR 3.903(A)(14) ("Legal Custodian means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state . . ."). It is unclear whether she is also the legal guardian of the child.

Respondent appeals from a May 2015 order of the trial court purporting to terminate her parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). A proceeding to terminate parental rights is governed by MCR 3.977, which provides that "This rule applies to all proceedings in which termination of parental rights is sought" (MCR 3.977(A)(1)) and that

“Parental rights of the respondent over the child may not be terminated unless termination was requested in an original, amended, or supplemental petition . . . .” MCR 3.977(A)(2). Critically, MCR 3.977(B) defines “respondent” as the natural or adoptive mother of the child and the father of the child as defined by MCR 3.903(A)(7). MCR 3.977(B) also specifically states that “ ‘Respondent’ does not include other persons to whom legal custody has been given by court order, persons who are acting in the place of the mother or father, or other persons responsible for the control, care, and welfare of the child.” Thus, while a respondent, for purposes of child protective proceedings, *generally* includes a parent, guardian, legal custodian, or nonparent adult who has allegedly committed an offense against the minor child (MCR 3.903(C)(12)), a respondent in a termination proceeding may *only* be a parent. MCR 3.977(B); MCR 3.903(C)(12).

MCL 712A.19b further provides that:

(1) Except as provided in subsection (4), if a child remains in foster care in the temporary custody of the court following a review hearing under [MCL 712A.19(3)] or a permanency planning hearing under [MCL 712A.19a] or if a child remains in the custody of a guardian or limited guardian, upon petition of the prosecuting attorney, whether or not the prosecuting attorney is representing or acting as legal consultant to the agency or any other party, or petition of the child, guardian, custodian, concerned person, agency, or children's ombudsman as authorized in section 7 of the children's ombudsman act, 1994 PA 204, MCL 722.927, the court shall hold a hearing to determine if the parental rights to a child should be terminated and, if all parental rights to the child are terminated, the child placed in permanent custody of the court.

\*\*\*

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

\*\*\*

The use of the phrase “parent’s parental rights” in MCL 712A.19b is significant, given that a “parent” is not the same as a “custodian” or “legal custodian” for purposes of termination proceedings under MCR 3.977. And, while “parent” is not specifically defined in MCL 712A.19b, it is defined in MCR 3.903(A)(18) as “the mother, the father as defined in MCR 3.903(A)(7), or both, of the minor . . . .”

Given the above provisions, it is clear that while respondent-aunt may be a respondent for purposes of jurisdiction in a child protective proceeding, she *may not* be a respondent in a termination of parental rights proceeding because those proceedings are strictly limited to “parents” as defined in the relevant court rules. Therefore, while respondent does not challenge the trial court’s authority to terminate her “parental rights” in her brief on appeal, the fact remains that the trial court had no authority to proceed with a termination of parental rights

hearing with respect to respondent. And, the factors under which the trial court terminated respondent's "parental rights" set forth in MCL 712A.19b(3) are not applicable to a determination of whether the respondent should continue her legal custody over the minor child, as they, too, are applicable only to parents in termination of parental rights proceedings. Procedurally and analytically, then, the trial court erred.

The trial court removed the minor child from her custodial home with respondent, as authorized by the Juvenile Code, MCL 712A.2(b). When the Department of Human Services petitions for the removal of a child under MCL 712A.2(b) it is then required to hold a preliminary hearing and may authorize the petition upon a showing of probable cause that one or more of the allegations in the petition are true and fall within the provisions of MCL 712A.2(b). *In re Rood*, 483 Mich 73, 95; 763 NW2d 587 (2009); MCL 712A.13a(2). At the hearing, if the trial court does not dismiss the petition for removal, it may release the child or, if it does not return the child home, it shall order that the child be placed in a family-like setting most consistent with the child's needs. *Rood*, 483 Mich at 95. Within 30 days of placement, the petitioner (Department of Human Services) must provide an initial services plan. *Id.* at 95-96. In this matter, respondent admitted to one or more of the allegations in the petition, the trial court took jurisdiction over the child, the child was placed in a foster home, and the Department of Human Services (DHS) provided an initial services plan, all consistent with the relevant and applicable court rules and statutes.

Next, if the trial court acquires jurisdiction over a child in a child protective proceeding, the dispositional phase follows, at which "the trial court determines what action, if any, will be taken on behalf of the child." *In re Utrera*, 281 Mich App 1, 16; 761 NW2d 253 (2008); See also MCR 3.973(A). At the conclusion of the dispositional hearing, the trial "court shall enter an order of disposition as provided in the Juvenile Code and these rules." MCR 3.973(F). MCR 3.973 further instructs: "**(G) Subsequent Review.** When the court does not terminate jurisdiction upon entering its dispositional order it must: (1) follow the review procedures in MCR 3.975 for a child in placement . . . ." MCR 3.975 directs that a dispositional review hearing must be conducted to permit court review of the progress made to comply with its order of disposition and any case service plan and that following such hearing, the court may:

- (1) order the return of the child home,
- (2) change the placement of the child,
- (3) modify the dispositional order,
- (4) modify any part of the case service plan,
- (5) enter a new dispositional order, or
- (6) continue the prior dispositional order.

[MCR 3.975(G)]

The trial court appropriately conducted review hearings to consider respondent's compliance with the case services plan and to review any progress on her part. However, after

the March 9, 2015 review hearing, the trial court authorized a supplemental petition seeking to “terminate the mother’s parental rights.” (SCAO form JC 04). Authorization of the petition was in error, as respondent was not the mother or parent, did not fit the applicable definition of “parent” and was specifically excluded from being a respondent in a parental right termination proceeding under MCR 3.977(B).

The appropriate procedure would have been to conduct a permanency planning hearing rather than a termination hearing. If a child remains in foster care and parental rights have not been terminated, the court must conduct a permanency planning hearing within one year of the child's removal. *Rood*, 483 Mich at 99; MCL 712A.19a(1); MCR 3.976(B)(2). The child at issue was removed from respondent’s home in July 2014 and placed in foster care. It does not appear that at the time of the May 2015 “termination” hearing, the parental rights of the minor child’s parents had been terminated. Thus, the hearing date was an appropriate time to conduct the permanency planning hearing. Relevant to the instant matter, MCL 712A.19a provides:

(3) A permanency planning hearing shall be conducted to review the status of the child and the progress being made toward the child's return home or to show why the child should not be placed in the permanent custody of the court. The court shall obtain the child's views regarding the permanency plan in a manner that is appropriate to the child's age. In the case of a child who will not be returned home, the court shall consider in-state and out-of-state placement option

.....

\*\*\*

(7) If the agency demonstrates under subsection (6) that initiating the termination of parental rights to the child is clearly not in the child's best interests, or the court does not order the agency to initiate termination of parental rights to the child under subsection (6), then the court shall order 1 or more of the following alternative placement plans:

(a) If the court determines that other permanent placement is not possible, the child's placement in foster care shall continue for a limited period to be stated by the court.

(b) If the court determines that it is in the child's best interests based upon compelling reasons, the child's placement in foster care may continue on a long-term basis.

(c) Subject to subsection (9), if the court determines that it is in the child's best interests, appoint a guardian for the child, which guardianship may continue until the child is emancipated.

MCR 3.976, which also governs permanency planning hearings, similarly provides that at such a hearing, the trial court is to determine whether to return a child to his or her home. According to MCR 3.976:

**(A) Permanency Plan.** At or before each permanency planning hearing, the court must determine whether the agency has made reasonable efforts to finalize the permanency plan. At the hearing, the court must review the permanency plan for a child in foster care. The court must determine whether and, if applicable, when:

- (1) the child may be returned to the parent, guardian, or legal custodian;
- (2) a petition to terminate parental rights should be filed;
- (3) the child may be placed in a legal guardianship;
- (4) the child may be permanently placed with a fit and willing relative; or
- (5) the child may be placed in another planned permanent living arrangement, but only in those cases where the agency has documented to the court a compelling reason for determining that it would not be in the best interests of the child to follow one of the options listed in subrules (1)-(4).

\*\*\*

**(E) Determinations; Permanency Options**

\*\*\*

(2) *Determining Whether to Return Child Home.* At the conclusion of a permanency planning 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. Failure to substantially comply with the case service plan is evidence that the return of the child to the parent may cause a substantial risk of harm to the child's life, physical health, or mental well-being . . . .

\*\*\*

The court must articulate the factual basis for its determination in the court order adopting the permanency plan.

Were this Court to entertain treating the May 2015 hearing as a permanency planning hearing, we would accept the trial court's order as a determination not to return the minor child to respondent's home because "the return would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child" due, in large part, to her failure to substantially comply with the case service plan. MCR 3.976(E)(2). In its order, the trial court

concluded that “it is in the best interest of the minor child to terminate whatever custodial rights [respondent] has to that child.” Although the trial court did not indicate which specific findings it used to evaluate the child’s best interests, it listed its findings of fact on the record. The trial court found that respondent missed 13 parenting visits, that her property manager indicated rent remained an issue, and that despite a diagnosis of cannabis dependence, respondent continued to use marijuana. The trial court also found that respondent failed to complete parenting classes and the individual counseling to which she was referred, and tested positive for significant numbers of narcotics which have an impact on a person’s ability to function. Finally, the trial court found that respondent was addicted to narcotics, that respondent never completed her domestic violence or anger management classes, and that the difference in the child’s appearance 13 days after removal showed that respondent had not been providing proper care. These factual findings are sufficient to support a conclusion that the return of the child to respondent’s home would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child, as set forth in MCR 3.976(E).

However, MCR 3.976(A) also provides very specific options for the trial court if, at the conclusion of a permanency planning hearing, it determines that the child should not be returned to the parent, guardian, or legal custodian. In that event, the trial court must determine whether and when: a petition to terminate parental rights should be filed; the child may be placed in a legal guardianship; the child may be permanently placed with a fit and willing relative; or, if the agency has documented a compelling reason for determining it would not be in the child’s best interests to follow any of the prior options, whether and when the child may be placed in another planned permanent living arrangement. MCR 3.976(A).

MCL 712A.19a also provides the trial court with options following a permanency planning hearing where it has been determined that the child shall not be returned to his or her home. Specifically, MCL 712A.19a(7) allows for the child's continued placement in foster care for a limited period to be stated by the court; or, if the trial court determines that it is in the child's best interests based upon compelling reasons, the child's placement in foster care may continue on a long-term basis; or, if the court determines that it is in the child's best interests, appoint a guardian for the child, which guardianship may continue until the child is emancipated. The trial court did none of these at the conclusion of the May 2015 hearing. Thus, remand is necessary.

We would also note that to the extent that one may perceive any conflict between the trial court’s orders in this matter under the Juvenile Code and the August 29, 2013 order awarding respondent custody of the minor child in a foreign state civil matter, “once a juvenile court assumes jurisdiction over a child and the child becomes a ward of the court under the juvenile code, the juvenile court's orders supersede all previous orders, including custody orders entered by another court, even if inconsistent or contradictory.” *In re AP*, 283 Mich App 574, 593; 770 NW2d 403 (2009). According to *In re AP*, “the previous custody orders affecting the minor become dormant, in a metaphoric sense, during the pendency of the juvenile proceedings, but when the juvenile court dismisses its jurisdiction over the child, all those previous custody orders continue to remain in full force and effect.” *Id.* at 593-94. There is nothing, however, precluding the judge of a juvenile proceeding from considering or addressing related custody matters, such as vacating or modifying a custody order. *Id.*

On remand, the trial court is to follow the procedures set forth in the court rules and statutes with respect to respondent as a legal custodian. The trial court may enter any orders it deems fit concerning placement and custody of the child consistent with those rules and statutes.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto  
/s/ Henry William Saad  
/s/ Colleen A. O'Brien