STATE OF MICHIGAN

COURT OF APPEALS

In re THEMINS, Minor.

UNPUBLISHED
March 17, 2016

No. 329303
Kalamazoo Circuit Court
Family Division
LC No. 2013-000511-NA

Before: GLEICHER, P.J., and MURPHY and OWENS, JJ.

PER CURIAM.

The circuit court terminated the respondent-father's parental rights to his young daughter pursuant to MCL 712A.19b(3)(g) (failure to provide proper care and custody) and (j) (reasonable likelihood of harm to the child if returned to the parent's care). On appeal, respondent contends that the circuit court violated his due process rights by keeping the child in care based only on the adjudication of the child's mother. This constitutional deprivation nullified the court's determination that clear and convincing evidence supported the statutory grounds for termination and the court's conclusion that termination was in the child's best interests, respondent asserts. Although the circuit court erred in waiting to adjudicate respondent unfit until nearly a year after our Supreme Court issued its decision in *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014), the post-adjudication record supports the termination decision. We therefore affirm.

I. BACKGROUND

ST was born with marijuana and opiates in her system and suffered serious withdrawal symptoms requiring a decreasing-dose morphine regimen. Child Protective Services (CPS) took ST immediately into care based on her mother's drug abuse during pregnancy, the special medical needs of the child caused by mother's actions, and because respondent questioned the child's paternity and refused to submit to a drug screen. He also told the CPS investigator that he had a history of substance abuse and had lost visitation with his older daughter. In order to regain visitation rights, respondent was required to provide three clean drug screens. However, he had not submitted to testing in that case either. Within the month, mother pleaded to the allegations in the child protective petition and the court took jurisdiction over the baby. ST was placed in nonrelative foster care.

Over the following months, mother began services geared toward reunification with her child. However, she never complied with services or benefitted to a point to regain custody of her child. Following a DNA test establishing ST's paternity, respondent signed an affidavit of parentage. The parents participated in supervised parenting time with the infant until May 2014.

Initially, the visits were scheduled at the parents' apartment, but were moved to the agency managing the case after they cancelled too many sessions. Claiming they felt "uncomfortable" being supervised, respondent and mother discontinued parenting time sessions between May and August 2014. They visited then nine-month-old ST twice in August 2014. During those visits, which were supervised by the caseworker, the baby cried until she became physically exhausted. Learning that the agency intended to include the foster mother in the visits to calm the child, respondent and mother again ceased visitation.

On June 2, 2014, the Supreme Court released its opinion in *Sanders*, 495 Mich 394, ruling that a circuit court deprives a parent of his or her fundamental due process right to the care and custody of his or her child when the court requires a parent to participate in the dispositional phase of a child protective proceeding before a court adjudicates the parent unfit. As a result, the court ordered the Department of Human Services (DHS)[1] to file an adjudication petition in relation to respondent. The DHS did so, and a hearing was scheduled for October 2014. However, respondent failed to appear in court for two hearings that month and the adjudication could not be conducted. Contemporaneously, respondent filed a motion through his appointed counsel to reinstate his parenting time sessions with ST. In a separate family court action, respondent sought custody of the child. In support of his requests, respondent argued that his conduct had not spurred the child protective proceedings, he was a safe placement option for his child, and he had terminated his relationship with mother, who had ceased participating in services by that point.

The court in the current action reinstated respondent's parenting time but ordered that the sessions be supervised. In the custody action, the court placed the suit on hold pending the resolution of the child protective proceeding. In the meantime, respondent refused the caseworker access to his apartment to verify that mother was no longer living with him, and failed to follow through and schedule parenting time sessions. Respondent also ignored messages from the caseworker regarding infant mental health services and occupational therapy that ST required and her biological parent needed to approve.

Ultimately, the DHS filed an amended petition seeking to concurrently adjudicate respondent-father as unfit and terminate his parental rights. The termination hearing began on April 1, 2015. Based on evidence that respondent had not visited his daughter since August 2014, and had not stayed in contact with the caseworker, the court adjudicated respondent unfit and entered its order on May 14, 2015.

Although respondent could have scheduled 12 parenting time sessions in the month of April 2015, he scheduled only four and failed to appear for two. Respondent became emotionally upset at both visits, cutting the last one short. He later claimed that he felt "uncomfortable" visiting with his child in front of strangers, denied the caseworker's description of ST's trauma during the visits, and urged the court to order unsupervised parenting time. When his request was denied, respondent indicated that he would not participate in parenting time sessions.

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[1] The department has since been reconfigured as the Department of Health and Human Services.

Following the adjudication, respondent continued to refuse parenting time. He was arrested three times in July 2015: once for cocaine possession, once for driving under the influence of alcohol, and once for nonpayment of child support in relation to his older daughter. The caseworker also learned that respondent had overdosed on heroin in February and May 2015. That May, respondent sent the caseworker a text message indicating that he and the child's mother had reunited and were living together again.

Respondent failed to appear for the continued termination hearing on July 9, 2015. Respondent contended that he could not leave work, but he had told the child's maternal grandmother that he needed to avoid court because there was a bench warrant for his arrest for nonpayment of child support. He then failed to appear for the rescheduled hearing date on August 18 because he had broken his femur in a golf cart accident. At the conclusion of that hearing, the court terminated the mother's parental rights and she has not appealed that judgment.

Respondent finally appeared in court on August 28, 2015. The circuit court acknowledged that respondent was not under any court order prior to his adjudication. To avoid violating respondent's due process rights, the court stated that it would not base its termination decision on pre-adjudication events. The court then terminated respondent's parental rights finding that his failure to consistently visit ST ensured that he shared no bond with the child. Given respondent's positive assertion that he would not visit with ST as long as the sessions were supervised, the court concluded that the rift could not be remedied. Accordingly, the court found clear and convincing evidence that respondent had not provided proper care and custody for his child and could not do so within a reasonable time and that ST faced a high likelihood of emotional harm if returned to respondent's care, and terminated his parental rights.

This appeal followed.

II. ANALYSIS

A. DUE PROCESS

Respondent-father argues on appeal that the circuit court deprived him of due process of law by retaining ST in care when he had not been adjudicated unfit. He challenges the court's use of his failure to visit the child against him, contending that the court should never have been involved in his parent-child relationship and therefore it violated his constitutional rights to order supervised parenting time. He further asserts that the denial of due process nullifies the court's finding of statutory grounds to support termination and weighs in his favor during the best-interest analysis.

"Whether child protective proceedings complied with a parent's right to procedural due process presents a question of constitutional law, which we review de novo." *Sanders*, 495 Mich at 403-404. This Court summarized the change in the law occasioned by *Sanders* in *In re Kanjia*, 308 Mich App 660, 663-665; 866 NW2d 862 (2014):

> "In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase." *Sanders*, 495 Mich at 404. "Generally, a court determines whether it can take jurisdiction over the child in

the first place during the adjudicative phase." *Id.* Jurisdiction is established pursuant to MCL 712A.2(b). *Id.* "When the petition contains allegations of abuse or neglect against a parent, MCL 712A.2(b)(1), and those allegations are proved by a plea or [by a preponderance of the evidence] at the [adjudication] trial, the adjudicated parent is unfit." *Id.* at 405. "While the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because the procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights." *Id.* at 405-406 (quotation marks and citation omitted).

Child protective proceedings are initiated by the state's filing a petition in the family division of the circuit court requesting the court to take jurisdiction over a child. *Id.* at 405. A respondent-parent may admit the allegations in the petition, plead no contest to the allegations, or demand a trial. *Id.* In any event, to take jurisdiction over a child, the trial court must find that the petitioner has proved by a preponderance of the evidence one or more statutory grounds for the taking of jurisdiction alleged in the petition. *Id.* If the court takes jurisdiction over the child, the proceedings enter the dispositional phase, wherein the trial court has broad authority to effectuate orders aimed at protecting the welfare of the child, including ordering the parent to comply with the [DHS] case service plan and ordering the DHS to file a petition for the termination of parental rights if progress is not being made. *Id.* at 406-407.

Before *Sanders* was decided, under the one-parent doctrine, a trial court was not required to adjudicate more than one parent; instead, a trial court could establish jurisdiction over a minor child by virtue of the adjudication of only one parent, after which it had authority to subject the other, unadjudicated parent to its dispositional authority. *Id.* at 407. See *In re CR*, 250 Mich App 185, 202-203; 646 NW2d 506 (2002), overruled by [*Sanders*, 495 Mich at 422].

> In simpler terms, the one-parent doctrine permits courts to obtain jurisdiction over a child on the basis of the adjudication of either parent and then proceed to the dispositional phase with respect to both parents. The doctrine thus eliminates the petitioner's obligation to prove that the unadjudicated parent is unfit before that parent is subject to the dispositional authority of the court. [*Sanders*, 495 Mich at 408.]

However, in *Sanders*, our Supreme Court held that the one-parent doctrine violated procedural due process. *Id.* at 422. Recognizing that the right of a parent to make decisions concerning the care, custody, and control of his or her children is fundamental, *id.* at 409, and that due process "demands that minimal procedural protections be afforded an individual before the state can burden a fundamental right," *id.* at 410, our Supreme Court held that a parent must be individually adjudicated as unfit before the state can interfere with his or her parental rights, *id.* at 415, 422. Because the one-parent doctrine allowed a trial court to interfere with the constitutionally protected parent-child relationship without any finding that the parent was unfit, it violated the Due Process Clause of the Fourteenth

Amendment. *Id.* at 422. To comply with due process requirements, the state is required to do the following:

> When the state is concerned that neither parent should be entrusted with the care and custody of their children, the state has the authority—and the responsibility—to protect the children's safety and well-being by seeking an adjudication against both parents. In contrast, when the state seeks only to deprive one parent of the right to care, custody and control, the state is only required to adjudicate that parent. [*Id.* at 421-422.] [Most alterations in original.]

The circuit court violated respondent's right to due process by withholding custody of his daughter between November 1, 2013 and May 14, 2015, when it finally adjudicated respondent unfit. Before May 14, 2015, the court and the DHS lacked authority to order respondent's compliance with any case service plan.

The easiest way for respondent to protect his rights would have been to challenge the order taking ST into care in the first place. He did contest the removal of his child, but the court granted no relief. In *In re McCarrick*, 307 Mich App 436, 470; 861 NW2d 303 (2014), this Court recommended that the Supreme Court consider amending MCR 3.933 to permit a parental appeal as of right from an order removing a child from his or her parent's care prior to adjudication. In doing so, this Court reasoned:

> When a parent's action or neglect sufficiently threatens a child's safety to justify removal at the outset of a child protective proceeding, it is neither surprising nor objectionable that such removal would correlate with a higher likelihood of termination. However, as several recent cases have shown, the decision to remove a child can substantially affect the balance of the child protective proceedings even when the initial concerns are eventually determined to have been overstated.[103] In such cases, the parent may find his or her parental rights terminated not because of neglect or abuse, but because of (1) a failure to adequately comply with the Department's directives and programs and (2) a loss of bonding because of a lack of parental visitation.
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> Permitting a parent to appeal a removal order as a matter of right may be one way to minimize the likelihood of this unfortunate occurrence. . . .

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103 See [*Sanders*, 495 Mich 394]; *In re Farris*, unpublished opinion per curiam of the Court of Appeals, issued August 8, 2013 (Docket No. 311967), lv gtd 497 Mich 864; 852 NW2d 900 (2014); *In re LaFrance*, 306 Mich App 713, 858 NW2d 143 (2014). [*Id.*]

Here, as in *McCarrick*, the court's termination decision was based on the lack of bonding. However, unlike in the *McCarrick* scenario, the "initial concerns" that merited taking the child

into care were not "overstated." MCL 712A.19b(1) permits a court to take a child into care when her parents have not provided care and custody and subsection (2) when the parents' home is unfit for the child due to "neglect, cruelty, drunkenness, criminality, or depravity." The child's mother abused drugs throughout her pregnancy, causing significant harm to ST, and respondent failed to protect his child by intervening. The CPS had reason to believe that respondent also abused controlled substances as he refused to take a drug test, admitted to the investigator that he had recently used marijuana, and had lost visitation rights with his older daughter for failure to provide drug screens. He also failed to admit paternity until the child was two months old. Even if respondent had done nothing wrong, as he repeatedly claimed, he lived with the mother at that time, and she had been adjudicated unfit to care for the child. Accordingly, he was not in a position to take custody of ST after her birth and the subsequent state intervention was not to blame for the lack of a parent-child bond.

Moreover, the DHS did try to work with respondent to create the necessary bond. The DHS originally permitted parenting time sessions in respondent's home, but this convenience was lost when he and the mother cancelled too many sessions. Respondent then chose not to visit ST between May and August 2014, and again from late August 2014 through April 2015. When the parents decided to resume visitation in August 2014, then nine-month-old ST did not know them and she cried during visits until she became physically exhausted. Knowing that the DHS intended to involve the foster mother in the visits for the child's sake, respondent decided not to attend.

Assuming respondent was being truthful, he and the child's mother did not end their relationship until November 2014. Accordingly, his home did not become even potentially adequate for placement until one year into the proceedings. At that time, the court granted respondent's request to reinstate parenting time sessions. Even if respondent had done nothing to instigate government intervention, his failure to participate in visitation rendered him a stranger to ST. The circuit court therefore reasonably ordered that parenting time sessions be supervised at that time.[2] Yet, respondent did not take advantage of parenting time to become reacquainted with his daughter. Respondent also failed to appear for hearings so the court could adjudicate him either fit or unfit. Had Respondent appeared in court as ordered in October 2014, he could have initiated services geared toward reunification.

As respondent continually failed to visit his daughter, the DHS decided to seek termination concurrent with adjudication. And the court entered an order adjudicating respondent unfit based on the evidence presented at the April 1, 2015 termination hearing. After

[2] MCL 712A.13a(13) provides:

> If a juvenile is removed from his or her home, the court shall permit the juvenile's parent to have frequent parenting time with the juvenile. If parenting time, even if supervised, may be harmful to the juvenile, the court shall order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time. The court may suspend parenting time while the psychological evaluation or counseling is conducted.

adjudication, the only orders with which respondent had to comply were to visit his daughter and stay in touch with the caseworker. He completely failed to visit his daughter after April 30 and specifically stated he would not do so as long as the visits were supervised. Accordingly, he chose not to repair his bond with his daughter. And in May 2015, despite that she had made no progress on her case service plan, respondent reunited with the child's mother, guaranteeing that his home would be an unfit placement for his child.

Ultimately, although the court waited until May 14, 2015 to adjudicate respondent unfit, the due process violation did not taint the termination decision. Evidence supported the emergency petition to take ST into care. Post-adjudication, respondent did not comply with court orders to visit his daughter and keep in touch with his caseworker. He was arrested three times post-adjudication. And he chose to cohabitate with the child's mother, whose parental rights were terminated before his. Accordingly, the damage done by respondent following his adjudication sealed his fate.

B. STATUTORY GROUNDS

Respondent continues that the denial of his due process rights nullifies the court's finding of statutory grounds to terminate his parental rights. This argument lacks merit given the record evidence.

Pursuant to MCL 712A.19b(3), a circuit court "may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence" that at least one statutory ground has been proven. The petitioner bears the burden of proving that ground. MCR 3.977(A)(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). We review a circuit court's factual finding that a statutory termination ground has been established for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013) (quotation marks and citation omitted). "Clear error signifies a decision that strikes us as more than just maybe or probably wrong." *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009).

The court terminated respondent's parental rights under MCL 712A.19b(3)(g) and (j), which provide:

> (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:
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> * * *
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> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
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> * * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

The court's reliance on factor (g) was supported by clear and convincing record evidence. Following his adjudication, respondent failed to provide "proper care or custody." He expressly declined to visit with his child because he felt "uncomfortable" being supervised. He made this choice despite being warned on the record that ST's best interests required such supervision. Accordingly, respondent provided no emotional support for his child. Although gainfully employed, respondent also failed to provide any financial support.

Factor (g) also includes a future component, making termination improper if the parent can remedy the condition with a reasonable time. The evidence is clear that respondent *would not* remedy his ability to provide proper care and custody within any timeframe. ST has severe bonding and attachment issues, possibility connected with her prenatal drug exposure. These caused her emotional trauma during parental visits, evidenced by her crying to the point of physical exhaustion. One way to remedy this problem and to rectify the parent-child bond would be to allow an infant mental health therapist and/or the foster mother to be present during visits to assist in the bonding process and keep the child calm. Even at the final termination hearing, respondent indicated that he would not participate in parenting time sessions with the therapist or the foster mother in the room. Accordingly, respondent has chosen not to remedy this deficit.

For the same reason, returning ST to respondent's care could cause the child harm. Respondent was unwilling to recognize ST's special needs and work with the DHS to reacquaint himself with the child so she could feel safe in his presence. In addition, respondent's decision to reunite with the child's mother, who had not complied with her service plan and therefore had no hope of regaining custody, was further evidence that he would not put ST's safety first.

C. BEST INTERESTS

Respondent latches onto language in *Sanders*, 495 Mich at 418 n 14, to support his claim that the loss of his due process rights must be weighed in considering whether termination of his parental rights is in ST's best interests: "[T]he one-parent doctrine results in the unadjudicated parent's rights being subordinated to the court's best interest determination." However, the court did adjudicate respondent unfit. Despite that the circuit court did not adjudicate respondent when it adjudicated the mother, it eventually did so. Thus, an unadjudicated parent's rights were not at stake in the best-interest analysis. Accordingly, the court did not subordinate respondent's rights when making its best interest determination.

"Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012), citing MCL 712A.19b(5). "[W]hether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence." *Moss*, 301 Mich App at 90. The lower court should weigh all the evidence available to it in determining the child's best interests. *Trejo*, 462 Mich at 356-357. Relevant factors in this consideration include "the child's bond to the parent, the parent's

parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *Olive/Metts*, 297 Mich App at 41-42 (citations omitted).

The uncontradicted evidence establishes that ST has no bond with her father. Although part of this rift was caused by the removal of ST from respondent's care directly after her birth, no bond was formed thereafter as respondent refused to visit the child. Respondent failed to demonstrate any parenting ability because he did not commit to parenting time where he could have exhibited his skills. The evidence also establishes that keeping ST in her foster home serves her best interests. As noted, respondent is living with the child's mother, who has not appealed the termination of her parental rights and has exhibited no desire to participate in services. Given respondent's reports regarding his busy work schedule, he will not be the one at home caring for his child. And the child's mother cannot legally be the child's caregiver. Moreover, respondent exhibited a complete lack of understanding of ST's emotional and mental state during the proceedings. For example, he thought the baby felt "uncomfortable" being in the care of a foster family and would adjust to being placed in his care within a couple of weeks. The foster family, on the other hand, cared for ST as she went through withdrawal and was weaned from morphine. They ensured ST's special mental and emotional needs were met. Given this record, the evidence preponderated in the direction of termination.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ William B. Murphy
/s/ Donald S. Owens