

STATE OF MICHIGAN  
COURT OF APPEALS

UNPUBLISHED

August 28, 2012

In the Matter of KIECA, Minors.

No. 307194

Oakland Circuit Court

Family Division

LC No. 11-782768-NA

Before: O'CONNELL, P.J., AND JANSEN AND RIORDAN, JJ.

RIORDAN, J. (*dissenting*)

Lacking the proper jurisdictional authority, the trial court's order terminating respondent mother's parental rights is void.

The majority contends that because jurisdiction was properly found based on the conduct of respondent father, who did not appeal, this Court need not, and should not, address respondent mother's challenge to jurisdiction. That conclusion is based on the flawed premise that jurisdiction is tied to the appellant parent, rather than the child.

In the adjudication phase of termination proceedings, "the trial court must first determine whether it may exercise jurisdiction over the *child*." *In re PAP*, 247 Mich App 148, 152; 640 NW2d 880 (2001) (emphasis added). As illustrated by this language, the jurisdictional inquiry directs a trial court to adjudicate over the child, not the parent, based on the existence of statutory grounds. Since the focus is on the children, an appeal challenging the trial court's adjudication necessarily requires an examination of whether adjudication over the children was properly founded based on either respondent mother's or father's conduct.

This conclusion is fortified by the fact that this appeal involves inviolate concepts of jurisdiction and due process. See *Yoost v Caspari*, 295 Mich App 209, 219; 813 NW2d 783 (2012). Without personal jurisdiction, a court lacks the ability to bind the parties, and a "jurisdictional defect . . . renders all proceedings in the family court void." *In re Terry*, 240 Mich App 14, 21; 610 NW2d 563 (2000). Further, it is a well-recognized principle that the termination of parental rights infringes on a "fundamental liberty interest of natural parents in the care, custody, and management of their child." *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982); see also *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001). Thus, the state "must provide the parents with fundamentally fair procedures" in order to ensure that parents' "precious" right to raise their children is not infringed upon lightly. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009) (internal quotations and citation omitted).

A review of the evidence presented in the trial court shows that the jury's jurisdictional verdicts constituted plain error.<sup>1</sup> The trial court exercised jurisdiction pursuant to MCL 712A.2(b)(5), which states that jurisdiction over a minor child is proper:

[i]f the juvenile has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, and the juvenile's parent meets both of the following criteria:

- (A) The parent, having the ability to support or assist in supporting the juvenile, has failed or neglected, without good cause, to provide regular and substantial support for the juvenile for 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for 2 years or more before the filing of the petition.
- (B) The parent, having the ability to visit, contact, or communicate with the juvenile, has regularly and substantially failed or neglected, without good cause, to do so for 2 years or more before the filing of the petition.

In regard to respondent mother, she acknowledged that she failed to provide regular and substantial financial support for the minor children in the two years before the petition was filed without any significant reason justifying her behavior. Pursuant to MCL 712A.2(b)(5)(B), the jury also had to find that a preponderance of the evidence established that respondent mother had the ability to visit, contact, or communicate with the minor children but substantially and regularly failed to do so, without good cause, for two years before the petition was filed. However, this is in error as respondent mother did not have the ability to visit, contact, or communicate with her children.

In 2009, respondent mother lived with the minor children for approximately half of the year and had daily contact with them. Even after petitioners forced respondent mother to move out of the home, she repeatedly called the house in an attempt to contact the minor children, even when living in South Carolina. Petitioners acknowledged that respondent mother was calling and sending cards but that they blocked all correspondences. Petitioners' behavior in blocking all correspondences was a "substantial reason" that contributed to the lack of contact between respondent mother and the minor children and constitutes good cause for respondent mother's failure to contact. See *In re Utrera*, 281 Mich App 1, 22; 761 NW2d 253 (2008). Because *both*

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<sup>1</sup> Because respondent mother failed to file a motion for a new trial that the jury's verdict was against the great weight of the evidence, our review is limited to plain error affecting substantial rights. *Heshelman v Lombardi*, 183 Mich App 72, 83; 454 NW2d 603 (1990); *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006). Plain error exists when the error is clear or obvious and affects substantial rights. *In re Smith Trust*, 274 Mich App 283, 285-286; 731 NW2d 810 (2010). Respondent mother's attack of jurisdiction is not a collateral attack, as her parental rights were terminated at initial disposition. See *In re SLH*, 277 Mich App 662, 668-669; 747 NW2d 547 (2008).

elements of MCL 712A.2(b)(5) were not established by a preponderance of the evidence, the trial court's exercise of jurisdiction over the minor children based on respondent mother's conduct was improper.

For the same reason, the trial court's exercise of jurisdiction based on respondent father's conduct also was improper. While the evidence demonstrated that respondent father had the ability to provide regular or substantial support in the two years before the petition was filed but failed to do so without good cause, MCL 712A.2(b)(5)(A), he also was restricted by court order from visiting, contacting, or communicating with his children during that time period. Under MCL 712A.2(b)(5)(B), a parent does not have the ability to visit, contact, or communicate with children when that ability to do so is restricted by a court order. See *In re Kaiser*, 222 Mich App 619, 623-625; 564 NW2d 174 (1997).<sup>2</sup> Since respondent father's visitation rights were suspended in February 2009 and the petition was filed in March 2011, his ability to see the children was restricted for the entire two year period before the petition was filed. Thus, an exercise of jurisdiction based on respondent father's conduct also was in error.

In light of the facts presented at the adjudication trial, I conclude that the jury's jurisdictional verdicts constituted plain error. Without jurisdiction, the trial court simply was not permitted to take any further action, including proceeding to the termination phase of the proceedings and terminating respondent mother's parental rights. See *In re Terry*, 240 Mich App at 21.

I respectfully dissent from the majority opinion and would recommend reversal of the trial court's order terminating respondent mother's parental rights as it had no jurisdiction over the minor children.

/s/ Michael J. Riordan

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<sup>2</sup> In *In re Kaiser*, 222 Mich App 619, 623-625; 564 NW2d 174 (1997), this Court construed the exact same language of a parent "having the ability to visit, contact, or communicate" with the minor children in the context of termination under MCL 710.51. The *Kaiser* court ruled that the second prong of MCL 710.51 is not satisfied when a court order restricts the parent's ability to visit, contact, or communicate with children.