

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
December 27, 2012

In the Matter of D. D. MACDONALD, Minor.

No. 310563
Kent Circuit Court
Family Division
LC No. 10-053889-NA

Before: **SERVITTO, P.J.**, and **MARKEY** and **MURRAY, JJ.**

PER CURIAM.

Respondent appeals by delayed leave granted the trial court's order denying her motion to set aside an order requiring respondent to have her daughter, J.M., visit with her son, D.M. We hold, based on the facts of this case, that the trial court exceeded its authority under MCL 712A.6 and MCR 3.973(A), and thus, we reverse the trial court's order and remand for further proceedings.

I. FACTUAL BACKGROUND & PROCEEDINGS

This case stems from the trial court's order requiring visitation between D.M. and J.M., who are both biological and adoptive siblings. As of October 2010, D.M. had become aggressive within respondent's home. Specifically, on one occasion, while respondent and D.M. were engaged in a verbal argument, D.M. attempted to assault respondent by unsuccessfully punching at her. At that point, respondent ordered D.M. out of the house, and in response, D.M. threw a chair at respondent and then attempted to lunge at her with closed fists, but, he was restrained by two other foster children. Additionally, D.M. admitted to having gang affiliations and using marijuana. Moreover, other gang members had made threats towards respondent and the other children in her house. As a result of these events, respondent refused to allow D.M. back into her home because she feared for the safety of herself, J.M., and her other foster children.

Based on these facts, a neglect petition was filed naming both D.M. and J.M. However, J.M. was never removed from respondent's home and the trial court concluded that respondent's home was the proper placement for J.M. and the other foster children because they were not at any risk of harm. In fact, the trial court noted that D.M. was a delinquent and his behavior had placed respondent in a very difficult situation because she was forced to refuse custody of D.M. in order to protect J.M. and the other children in her home. While J.M. was removed from the neglect petition, the trial court took jurisdiction over D.M., and D.M. remained in out-of-home placement. Subsequently, a contested adjudication hearing was held. Following the hearing, the

trial court took jurisdiction over D.M., made D.M. a temporary ward of the court, and continued D.M.'s out-of-home placement. Eventually, because of D.M.'s age, petitioner changed the goal from reunification to emancipation.

During the course of D.M.'s case, the trial court decided that there should be supervised visitation between D.M. and J.M. Respondent opposed J.M. having contact with D.M. because of D.M.'s violent behavior, possible gang involvement, and threats that he was going to take J.M. away from respondent. It was also respondent's position that the trial court lacked jurisdiction over J.M., and so it could not order visitation between J.M. and D.M. The trial court disagreed with respondent's contentions and concluded that because it had jurisdiction over respondent, it could order respondent to facilitate supervised visitation between D.M. and J.M.:

[Respondent] suggests the Court's prior order is focused at her daughter, [J.M.], when it is actually focused at [respondent]. MCL 712A.6 permits the Court in a child protective proceeding to "make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile . . . under its jurisdiction." See also, MCR 3.973(A).

Since [J.M.] is a child in the care and custody of her mother, the Court's order of September 21, 2011[,] requires [respondent] to facilitate visits between [D.M.] and [J.M.]. She is responsible to transport and pick up [J.M.] from the designated place for the sibling visitation. DHS has consistently recommended visits between [D.M.] and [J.M.], and the Court believes such supervised visits to be necessary for [D.M.'s] mental and moral well-being.

The Department of Human Services shall select times and places of the visits. [Respondent] shall transport [J.M.] to and from the visits. DHS shall be responsible for transporting [D.M.] to and from the supervised visits. DHS is authorized to cut-off the visit if there is inappropriate behavior during the visits. The visits shall be scheduled for one hour. [D.M.'s] Lawyer Guardian Ad Litem, Frederick Johnson, or his designee, shall be invited to be present at the visits.

The trial court denied respondent's motion for reconsideration of this order and respondent now appeals by delayed leave granted.

II. ANALYSIS

Respondent challenges the trial court's order as depriving her of her fundamental liberty interest in the care, custody, and control of her child. In light of respondent's constitutional liberty interest in raising her child, and the limitations of the trial court's jurisdiction pursuant to MCL 712A.6 and MCR 3.973(A), we hold that, under the particularly unique facts of this case, the trial court's order was not authorized by either statute or court rule.

A constitutional question is an issue of law that this Court reviews de novo. *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006). The interpretation of statutes, "as well as [the] family division procedure under the court rules, are reviewed de novo." *Id.* A trial court's findings of fact in termination proceedings are reviewed for clear error. *In re Rood*, 483 Mich 73, 90; 763 NW2d 587 (2009).

“Generally, the state has no interest in the care, custody, and control of the child and has no business interfering in the parent-child relationship.” *In re AP*, 283 Mich App 574, 591; 770 NW2d 403 (2009). Instead, “the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Troxel v Granville*, 530 US 57, 65-66; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (quotation marks and citation omitted). The right of parents to make decisions regarding the care, custody, and control of their children is well-recognized as a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 66. Flowing from this fundamental right is a presumption that fit parents act in the best interests of their children. *Id.* at 68. “[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.” *Id.* at 68-69. Moreover, “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.” *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982).

“The preeminence of a parent’s precious right to raise his or her child” is also firmly rooted in Michigan jurisprudence. *Frowner v Smith*, 296 Mich App 374, 381; 820 NW2d 235 (2012). “Historically, Michigan has recognized the right of parents to manage their children without state interference, absent compelling circumstances that threaten a child’s safety and welfare.” *Ryan v Ryan*, 260 Mich App 315, 333; 677 NW2d 899 (2004). Parents’ fundamental right to the care, custody, and control of their children includes the ability to deny visitation between the child and other relatives. *Brinkley v Brinkley*, 277 Mich App 23, 31-34; 742 NW2d 629 (2007) (finding fit parents could deny visitation between children and grandparents).

Although parents have a fundamental right to parent their children, the state may become involved if the child’s welfare is at issue, as in cases of abuse, neglect or abandonment. *In re AP*, 283 Mich App at 592. The Juvenile Code, MCL 712A.1 *et seq.*, governs the state’s involvement in these circumstances. *Id.* Once a petition is filed and authorized by the court, the trial court obtains jurisdiction over the matter. *Id.* at 593. The court obtains jurisdiction over the child (and the child becomes a ward of the court) after the court holds an adjudication on the merits of the petition and finds by a preponderance of the evidence that there is a factual basis for judicial intervention. *Id.* Once the child is under the court’s jurisdiction, the court may hold dispositional review hearings and permanency planning hearings, and enter orders related to the child’s care and custody. *Id.*; see also *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2002) (noting that the court’s jurisdiction is “tied” to the children).

In this case, the trial court relied upon MCL 712A.6 and MCR 3.973(A) to enforce its order requiring respondent to facilitate visitation between J.M. and D.M. The rules of statutory construction apply to the interpretation of both statutes and court rules. *Yudashkin v Holden*, 247 Mich App 642, 649; 637 NW2d 257 (2001). The goal of statutory interpretation is to discern the Legislature’s intent. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). The Court must look first to the language of the statute and where the language is “clear and unambiguous the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted.” *Universal Underwriters Ins Group v Auto Club Ins Ass’n*, 256 Mich App 541, 544; 666 NW2d 294 (2003) (quotation marks and citation omitted). In analyzing

statutory language, the Court should give words their “ordinary and generally accepted meaning.” *Tryc v Mich Veterans’ Facility*, 451 Mich 129, 135-136; 545 NW2d 642 (1996).

MCL 712A.6 states:

The court has jurisdiction over adults as provided in this chapter and as provided in chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082, and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction. However, those orders shall be incidental to the jurisdiction of the court over the juvenile or juveniles.

MCR 3.973(A) states:

A dispositional hearing is conducted to determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult, once the court has determined following trial, plea of admission, or plea of no contest that one or more of the statutory grounds alleged in the petition are true.

The language of both MCL 712A.6 and MCR 3.973(A) provides that the trial court has authority to make any order that the court determines is necessary for the physical, mental, or moral well-being of a child under its jurisdiction. We agree with respondent that although the trial court had this power concerning D.M. and herself, the trial court’s order exceeded the scope of its power and interfered with her constitutional right to parent J.M.

It is true that the Legislature has provided a “broad grant of authority . . . [incidental to the trial court’s jurisdiction] to protect children who come within its jurisdiction.” *In re Macomber*, 436 Mich 386, 389; 461 NW2d 671 (1990). Under this authority, the court may enter orders necessary for the well-being of a child under its jurisdiction. MCL 712A.6; MCR 3.973(A). However, the trial court’s authority is not unlimited. *In re Macomber*, 436 Mich at 398-399. Indeed,

[w]hile the language is broad, it provides sufficient guidance and needed flexibility to the court. The court is limited in that it can only act after it has jurisdiction over a child, and it may only act to ensure a child’s well-being. Any orders aimed at adults must also be incidental to the court’s jurisdiction over children. In addition, under § 6, the court may only make orders affecting adults if “necessary” for the child’s interest. The word “necessary” is sufficient to convey to probate courts that they should be conservative in the exercise of their power over adults. Furthermore, upon review of an order affecting adults, if an appellate court finds the factual record insufficient to justify the “necessity” of the order, it may overturn the order as clearly erroneous. [Id.] [Emphasis added.]

In this case, the trial court failed to conservatively exercise its power and interfered with respondent’s fundamental right to parent J.M. by entering an order that compelled respondent to facilitate visitation between J.M. and D.M. *In re Macomber*, 436 Mich at 398-399. Such an order was a tangential exercise of the trial court’s authority for D.M.’s benefit. See *In re CR*,

250 Mich App at 205 (noting that the trial court’s authority is “tied” to the children under the court’s jurisdiction). While the trial court correctly noted that it could enter orders necessary for D.M.’s well-being, there was no determination that respondent was an unfit parent regarding J.M. and no allegations that J.M. was being inadequately care for. Moreover, it is undisputed that J.M. had been removed from the neglect petition, and that the trial court never acquired jurisdiction over J.M. Consequently, J.M. remained solely in respondent’s care and respondent retained the right to make decisions regarding J.M.’s care, custody, and control.¹ *Troxel*, 530 US at 65-66.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Jane E. Markey

/s/ Christopher M. Murray

¹ Additionally, the trial court’s exercise of authority over J.M. is particularly problematic because there was no consideration of J.M.’s best interests. The trial court denied respondent the fundamental right to determine J.M.’s best interest, *Troxel*, 530 US at 68, and failed to make any determination regarding whether sibling visitation would be beneficial to J.M., resulting in the deprivation of respondent’s fundamental right to parent her child without the protections afforded when the trial court has jurisdiction over a child under the Juvenile Code, MCL 712A.1 *et seq.*