

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
February 15, 2011

In the Matter of J. N. HARDAWAY, Minor.

No. 298255
Wayne Circuit Court
Family Division
LC No. 04-426745

Before: K.F. KELLY, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Respondent Kimiko Hardaway, the mother of the involved minor child, appeals as of right a circuit court order terminating her parental rights to the child. Because the proceedings comprising the termination hearing violated respondent's right to due process under US Const, Am XIV and Const 1963, art 1, § 17, we reverse and remand for further proceedings.

In May 2008, the Department of Human Services (DHS) filed a permanent custody petition seeking to terminate respondent's parental rights to the newborn minor, on the grounds that respondent's parental rights to three other children were terminated in 2006, respondent had not in the prior proceedings completed and benefited from her treatment plan, and respondent tested positive for marijuana use in December 2007. The circuit court ordered the minor's temporary placement in the custody of the DHS. Eventually, respondent successfully completed a treatment plan, and in January 2009 the court placed the child back in respondent's care and terminated its jurisdiction over the child.

In January 2010, the DHS received a complaint alleging that respondent had abandoned the child in the care of family and friends. After an investigation, the DHS filed a permanent custody petition requesting termination of respondent's parental rights to the child. A termination hearing commenced in April 2010. After presenting two witnesses on the first day of the hearing, the DHS called respondent to the stand at the outset of the second hearing date. Referee Thomas Doetsch interrupted the child's counsel's cross-examination of respondent, and engaged in the following colloquy:

Referee: You know what? In 30 years—this is a charming note to end my career on—in 30 years, ma'am, I've never had a parent answer the questions about their child the way you just answered the questions.

Respondent: Me?

Referee: No, you'r [sic] not going to argue with me.

Respondent: I'm not—I don't know—

Referee: In 30 years—

Respondent: I'm not—

Referee: I didn't ask you to speak.

In 30 years, ma'am, I've never seen more detachment about a child and lack of maternal instinct that [sic] I've just witnessed today based upon your questions.

Referee: Do you have any other questions?

Guardian ad litem: I have a lot of questions.

Referee: Why? Why do you have a lot of questions? I'm missing the point here, folks?

Following additional brief questioning by the guardian ad litem, the referee and respondent had another exchange:

Referee: This level of complacency and, "Oh, well. Oh, well," and all that, is blowing the Court's mind, the trier of fact's mind.

Respondent: Referee Doetsch, I have never, not once gave up my child. I have plenty of witnesses to say I was sitting right next to her when she called and [respondent's sister] would brush her off. . . .

* * *

Referee: Ma'am, if you were 17 years old, you've never been through the court before, and everything else and all this.

You have a distinct history in the sense of previous terminations of three children.

Then you sit there and say, "Does that shut the door forever?"

And the answer is no.

[The child] come [sic] into care. We worked with you. You proved to me at that time that it seemed to be a fine situation. The child was returned. The Court terminated jurisdiction; was comfortable enough with you to terminate jurisdiction of a child still at a very young age.

Then a short time later the child comes back into care.

And today, based upon your responses, ma'am, I don't know what happened from the last time we had wardship to today, but I am so uncomfortable, I don't even have the thought of ever returning this child to you, ma'am, based upon your answers today, nothing else.

I don't care about anyone else. The way you answered today, the way you sound today, the lack of affect, the lack of almost everything across the board.

You're not the same person that I gave the child back to and terminated wardship on.

And you couple that with previous terminations and a period of wardship; I'm sorry, in good faith I cannot sit there and say this Petition hasn't been substantiated.

There is not [sic] other witness, short of God sitting here, that can tell me that I'm wrong.

A judge of this Court may see it differently, but I, in good conscience, could not not grant this Petition, and it's based upon her.

If I had any doubt, as I mentioned in the hallway, even though the overall scenario—that's what's shocking me. I can't believe I gave the child back to you and terminated wardship.

You were a different person. I don't know what caused the change. I don't have any idea. Maybe you're out doing stuff or whatever that's not being admitted to and we don't know about and who knows what. I don't know.

I know that today you could put a gun to my head and I would not give a second thought about ever giving this child back to you, ma'am.

The referee then inquired of respondent about her proposed defense of the termination petition:

Referee: [Respondent], is there something else that you can present that would sway me to—don't get excited.

* * *

Respondent's counsel: Your Honor, it sounded like you made a ruling. The only thing I can do is do my cross and put my witness on to at least lay a foundation for some type of clear and convincing standard.

I'm in a better [sic] position right now. I mean, you basically just said what you're going to do.

Referee: I'm overwhelmed by her testimony.

Respondent's counsel: I understand that.

But, you know, I do have some magic kernel of information that's going to change your mind?

Referee: What is your witness going to talk about? Give me an offer of proof.

Respondent's counsel: She is going to bear witness to [respondent's] attempt to get her child back, her constant calling [respondent's sister] about getting her child; where she is, pursuant to the agreement, why haven't you brought her back, and her being distressed as a result of [respondent's sister's] efforts to keep [the child] from her.

* * *

Referee: Let's say I accept her theory completely, that there was this change to a lack of support by the relatives and they were, in fact, harboring the child and not allowing her access.

* * *

The difficulty I have is—and even with your offer of proof, assuming that witness testifies to exactly to what you just said, okay?

The difficulty I have is the lack of validity that that is a true, serious effort by a mother, okay?

Respondent's counsel pointed out her prior success in completing her treatment plan, and urged the court to consider a remedy less severe than termination. Respondent's counsel also suggested, "Perhaps it would be appropriate to refer this to the Clinic, which gives certain insight prior to termination?" The referee replied, "A Clinic does not give any insight."

Without affording respondent's counsel to question her further or present any testimony or evidence, the referee concluded the second hearing date by announcing it would terminate respondent's parental rights.

You know, I just don't see any hope for this for reunification, I really don't; under the specific facts and history of this case.

If we didn't have history, then I would [sic] premature and everything else, no doubt.

And if I hadn't heard from her, again, no doubt.

But that isn't the case. You can't take things in isolation. I take judicial notice of the file and previous orders and findings for a reason. And I don't sit

there and put 30 years of experience at the back door and come in here and act like I'm a brand new referee when I hear a case.

And part of evaluating witnesses and credibility is to listen and to watch and to do that and utilize all those factors and that's what I've done today.

And in my heart, an [sic] all honesty—I hope we're still about honesty around here—I don't see anything but granting this Petition not [sic] being in the child's best interest, assuming anything you presented to me is exactly the way you said it.

And, you know, I know for the Court of Appeals or whoever wants to deal with this issue you're supposed to hear everything and do everything and get everything finished, I don't see where it's going to help me or change me; assuming everything that you're going to put on is absolutely true. It doesn't overcome my hurdles that I have about what a mother does to get her kids back.

And you're the first one—I have people come back and regress and all that. But you're the first one I've seen a change in character in, to be honest.

So, I'm going to grant the Petition.

And please appeal me. I don't have a problem with that.

On April 29, 2010, the referee issued a written recommendation entitled “Basis for Terminating Parent's Rights,” which ended its analysis as follows:

Frankly, based on this history, the Court needed to hear nothing else. *There was absolutely no way return would ever be considered for this child.* She was given ample time for her first 3 and failed. She was given a chance and succeeded last time concerning [the minor child]. But a third time, when she does not visit nor show any actions of caring was clear and convincing to terminate her rights. [Emphasis added.]

Respondent maintains that the circuit court denied her right to due process of law when it prevented her attorney from cross-examining her and presenting her defense. Because respondent did not lodge before the circuit court a due process objection to the referee's abbreviation of the termination hearing, we consider the unpreserved due process claim “for plain error affecting substantial rights.” *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009).

Parents possess a fundamental interest in the companionship, custody, care and management of their children, an element of liberty protected by the due process provisions in the Fourteenth Amendment of the United States Constitution and article 1, § 17, of the Michigan Constitution. *In re Rood*, 483 Mich 73, 91-92 (opinion by Corrigan, J.); 763 NW2d 587 (2009); *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). “When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.” *Santosky v Kramer*, 455 US 745, 753-754; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Before

termination of parental rights may occur, due process demands that the respondent receive notice of the proceeding and a full hearing and opportunity to be heard. *In re Kirkwood*, 187 Mich App 542, 546; 468 NW2d 280 (1991); see also *DeGeorge v Warheit*, 276 Mich App 587, 594; 741 NW2d 384 (2007) (observing that had the court precluded the appellant's witnesses from testifying, "due process implications" would have arisen).¹ "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948).

We conclude that the referee and the circuit court plainly subverted respondent's right to present her defense against the allegations in the January 2010 petition to terminate her parental rights, a view shared by respondent, petitioner, and the guardian ad litem. The referee disallowed respondent's counsel from cross-examining respondent, and then entirely denied counsel a fair opportunity to present a defense on respondent's behalf.² The deprivation of due process affected respondent's substantial rights and "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings." *People v Carines*, 460 Mich 750, 773; 597 NW2d 130 (1999). Consequently, we reverse the order terminating respondent's parental rights. In light of the referee's abdication of its responsibility to protect respondent's due process rights, and the circuit court judge's agreement that "[t]here was absolutely no way return would ever be considered for this child," we deem it prudent to remand for additional proceedings before a different judge and referee.

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

/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens

¹ In child protective proceedings, the Michigan Court Rules also dictate that a court must "proceed in a manner that safeguards the rights and proper interests of the parties." MCR 3.901, MCR 3.902(A).

² The circuit court compounded the referee's due process deprivation by simply signing a May 11, 2010 form order terminating respondent's parental rights and the referee's "Basis for Terminating Parent's Rights," without taking any steps to afford respondent the mandatory due process.