STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 1, 2011

In the Matter of S. MCEACHERN, JR., Minor.

No. 300601
Wayne Circuit Court
Family Division
LC No. 10-492790-NA

In the Matter of BARROS/MCEACHERN/ STURMAN, Minors.

No. 303176
Wayne Circuit Court
Family Division
LC No. 10-492790-NA

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

GLEICHER, J. (*concurring*).

I concur with the result reached by the majority regarding both respondent-mother and SM's father, S. McEachern. I write separately to express respectful disagreement with the majority's holding that *In re CR*, 250 Mich App 185; 646 NW2d 506 (2002), governs S. McEachern's appellate claims.

McEachern directly challenges the circuit court's order of disposition entered on August 30, 2010. He contends that by depriving him of his son's custody absent any showing that his custody of the child posed a danger to the child's well-being, the dispositional order violated his "fundamental right to parent." Citing *In re CR*, 250 Mich App at 203, the majority holds:

> Because the court properly acquired jurisdiction over the father's child based on the conduct of the respondent-mother, the father's challenge to the trial court's exercise of jurisdiction must fail. In addition, because the trial court's exercise of jurisdiction was proper, the court had the authority to order the father, as a party, to comply with the case service plan. [*Ante* at 5.]

In my view, the majority fundamentally misapprehends McEachern's claim. The critical issue presented in this appeal does not concern "the court's exercise of jurisdiction," but rather the propriety of the dispositional order denying him custody of his son during the pendency of the child protective proceedings.[1]

McEachern correctly asserts that in the absence of a preponderance of admissible evidence that he posed a danger to the child, the circuit court should have placed SM in his custody. 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; 763 NW2d 587 (2009) (opinion by Corrigan, J.). In *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972) (internal quotation omitted), the United States Supreme Court reaffirmed and emphasized the constitutionally protected rights of natural parents: "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." The importance of a parent's "essential" and "precious" right to raise his or her child is well-established in our jurisprudence. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). "There is no question that parents have a due process liberty interest in caring for their children . . . ." *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001). Because "[t]his right is not easily relinquished," "to satisfy constitutional due process standards, the state must provide the parents with fundamentally fair procedures." *Id.* at 257 (internal quotation omitted). As our Supreme Court acknowledged in *Hunter*, 484 Mich at 269, "where the parental interest is most in jeopardy, due process concerns are most heightened."

The facts of this case demonstrate that McEachern personally participated in all hearings regarding his son, and enjoyed the benefit of competent counsel. Although this case would be easier had petitioner fulfilled its oft-repeated promise to name McEachern as a respondent, the record evidence supports the circuit court's decision to place SM in foster care, rather than with McEachern. As such, I concur in the result reached by the majority.

On February 25, 2010, the Department of Human Services filed a petition seeking temporary custody of respondent-mother's four children, including SM. The petition alleged that McEachern (1) had engaged in domestic violence with respondent-mother, (2) sexually abused BB, respondent-mother's daughter from a previous relationship, and (3) "has a substance abuse problem involving marijuana[.]" At the time the petition was filed, McEachern resided in Missouri. He travelled to Michigan to attend the preliminary hearing, and requested visits with

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[1] The Court Rules provide that "an order of disposition placing a minor under the supervision of the court" is appealable to this Court as of right. MCR 3.993(A)(1). An order merely addressing the adjudication may be appealed by leave granted. See *In re SLH*, 277 Mich App 662, 668 n 13; 747 NW2d 547 (2008). McEachern appealed the circuit court's dispositional order pursuant to MCR 3.993(A)(1).

his son. The referee allowed the DHS to exercise its discretion whether to permit supervised visits at the agency or with a family member.

On April 21, 2010, the referee commenced an adjudication trial. At the outset, petitioner's counsel informed the court that petitioner intended to strike all allegations in the petition concerning McEachern because it expected to "immediately" file a permanent custody petition in relation to him. Petitioner's counsel made the following representations to the court:

> *The Court.* Very well. We're here this morning for what's been set as a bench trial. Are the parties ready to proceed?
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> *[Petitioner's Counsel]*. Yes. We're ready to proceed but I need to explain what DHS is proposing. We have just obtained - - just recently obtained new information, new allegations that are quite significant against Mr. McEachern and the petition does not allege the new information that we got. So, what I am proposing is that we would strike all allegations against Mr. McEachern that are in the petition and we will re-file a separate petition against him seeking termination of his parental rights and we could proceed today with the rest of the case as it deals with the mother and the other two fathers and we will subsequently do a trial with regard to Mr. McEachern.
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> *The Court.* Very well. So, you're asking the court essentially to strike all the allegations in the petition regarding [S McEachern] and you're moving to dismiss with regard to him today?
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> *[Petitioner's Counsel]*. Yes and we will re-file immediately. It's my understanding his son, [SM], was in the mother's custody, I believe. So, even though we dismissed the petition with regard to Mr. McEachern, his child was still remained in care throughout the pendency of this trial and depending on what you decide with regard to jurisdiction, [SM] will still remain in care while we prepare a new petition against Mr. McEachern.
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> *The Court.* Very well. Anything on behalf of Mr. McEachern?
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> *[McEachern's Counsel]*. Yes, your Honor. I would like to comment on this. My question would be when was this new alleged evidence brought to the people's attention because put it in the original petition, no alternative explanation might be that perhaps they recognize that this petition is very weak against my client and they make simply with adding a new petition because they may not win on this one.
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> *The Court.* And –
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> *[Petitioner's Counsel]*. If I may respond, I found out about it about a half hour ago and secondly, the petition we have is hardly weak. It's overtly – I mean, it explicitly alleges that sexual abuse by him against one of the children in this case, so, our case against him is not weak and that's not the reason why I'm opposing [sic] to dismiss and file a new petition. In fact, it's because new

information gives us a strong bases [sic] for terminating his parental rights and that should be in a separate petition.

The Court. And when do you anticipate filing this new petition?

[Petitioner's Counsel]. I think we can have that done in a matter of days, certainly, in a week at the most.

McEachern's counsel participated fully in questioning the witnesses who testified on the first day of the adjudication trial, and advanced appropriate arguments of behalf of his client. The trial continued more than a month later, on May 26, 2010. McEachern's counsel informed the court that petitioner still had not filed a petition against McEachern, and asserted, "My client should really be released from the proceedings right now. There is no charging document [] on the floor . . . . [W]e believe since there's no charging document against him he should be allowed to have the child go to Missouri to be with him." McEachern, participating by telephone, advised: "I wish to remain telephonically but also my concerns that I raised. . . . If there's no charges, why my son has not [sic] been released to my custody." The following colloquy ensued:

The Court. Okay. It's my recollection that the allegations were dismissed against your client on the first day of trial in anticipation of filing a permanent custody petition against your client and I'm unaware if that petition has been filed at this point.

[Petitioner's Counsel]. Petition has not been filed. I've been dealing with DHS on a constent [sic] basis since the last hearing with at least a half of a dozen phone calls and some e-mails and conference calls and at the present time, there is no petition filed against [] Mr. McEachern.

The Court. Very well.

[McEachern's Counsel]. So, can his child travel to Missouri. There's nothing against right now your Honor.

[Petitioner's Counsel]. Well, there are two issues, if I may respond to that. One is that we can't place the child out of state without doing an OTI, that is interstate compact investigation. Even with parents and secondly, mother was the custodial parent, so jurisdiction here would be based on primarily on the mother's behavior and the living conditions in the mother's home although father's behavior would ordinarily be relevant. This is primarily a case dealing with the mother more than the parents and so jurisdiction can still be based on the petition against the mother even if we don't have a petition at the present time against the father. But I would agree since there are no allegations against him, that unless we quickly file some kind of a petition, . . . we need to look at possibly placing his chidl [sic] with him and doing a interstate compact but I think that some kind of a petition will be filed . . . . I'm not sure what is going to be file[d], but some kind will be filed with specific allegations against Mr. McEachern which would probably keep interstate compact from going resulting in a placement with him in

> the immediate future is a possible - - a possibility that it might happened [sic] some time later.

Counsel and the court then discussed McEachern's status in the case. Counsel for petitioner and the respondents agreed that McEachern did not qualify as a respondent, but instead as a "party."[2] The referee agreed to continue McEachern's representation with court-appointed counsel.

Respondent-mother testified that McEachern smoked and sold marijuana during the time they lived together, regularly drank alcohol and became "violent when he [drank]," physically fought with her while intoxicated, and "took a knife to my throat in front of my young kids." Other evidence revealed that during respondent-mother's pregnancy with SM, Children's Protective Services accused McEachern of sexually touching BB, respondent-mother's daughter from an earlier relationship, and McEachern moved out of respondent-mother's home. Respondent-mother also offered hearsay evidence regarding McEachern's alleged sexual abuse of his own sister. When McEachern's counsel attempted to object to portions of respondent-mother's testimony, the court advised that he lacked standing to do so.

The court exercised jurisdiction over the children primarily based on respondent-mother's conduct. At the initial dispositional review hearing, McEachern's attorney renewed his challenge that SM should be placed in McEachern's care, but without success. By the time of the continued dispositional hearing on August 13, 2010, petitioner still had not filed a petition naming McEachern as a respondent. The court's order of disposition placed SM in the court's temporary custody, and ordered McEachern to comply with reunification services.

While I cannot condone the procedure used to deny McEachern the custody of his son during the pendency of these child protective proceedings, I believe the result is actually supported by a preponderance of the evidence. The evidence shows that SM would face a substantial risk of harm if placed in his father's care, based on McEachern's drug and alcohol abuse and his history of domestic violence. Further, with the exception of the referee's decision to curtail his objections during the second day of the adjudication trial, McEachern and his counsel fully participated in the proceedings. As a "party," I believe that McEachern should have been permitted to raise objection to inadmissible evidence, and to present evidence supporting his fitness.[3] In my view, had the record contained no admissible evidence supporting McEachern's unfitness, the circuit court could not have properly deprived him of his son's custody. Here, however, the record substantiates adequate grounds for temporarily depriving McEachern of his son's custody, pending further proceedings.

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[2] A "party" is defined by MCR 3.903(A)(19)(b) as the "petitioner, child, respondent, and parent, guardian, or legal custodian in a protective proceeding."

[3] It does not appear that McEachern sought to testify. His counsel did offer evidence that the allegations of sexual abuse remain unproven, and that the prosecutor had not filed any charges against McEachern.

The facts of this case readily distinguish it from *In re CR*, 250 Mich App 185. The petitioner in *In re CR* filed a petition naming both parents as respondents, but before proceeding to adjudication, agreed to dismiss the allegations regarding Chevy Richardson, the children's father. *Id.* at 188. The court exercised jurisdiction based on the mother's no-contest plea, and placed the children with Richardson. *Id.* Richardson agreed to submit to drug screens and to participate in services. *Id.* at 189-190. The children remained in Richardson's custody for the next seven months, and were removed from his care only when he entered prison. *Id.* at 191. The court subsequently terminated Richardson's parental rights.

On appeal, Richardson contended that he had been denied due process "because he was not a respondent in the proceedings at the adjudication and the family court had never determined that any of the allegations concerning him in any of the petitions were proved by legally admissible evidence." *Id.* at 194. This Court rejected Richardson's due process argument, explaining,

> [A]fter the family court found that *the children* involved in this case came within its jurisdiction on the basis of [the mother's] no-contest plea and supporting testimony at the adjudication, the family court was able to order Richardson to submit to drug testing and to comply with other conditions necessary to ensure that the children would be safe with him even though he was not a respondent in the proceedings. This process eliminated the FIA's obligation to allege and demonstrate by a preponderance of legally admissible evidence that Richardson was abusive or neglectful within the meaning of MCL 712A.2(b) before the family court could enter a dispositional order that would control or affect his conduct. [*Id.* at 202 (emphasis in original)].

In *In re CR,* this Court simply did not address whether the circuit court (then called the family court) could have constitutionally deprived Richardson of his children's *custody* in the absence of a preponderance of evidence that he qualified as unfit. In my view, *In re CR* simply does not support that a non-respondent parent may be deprived of the custody of his child absent evidence of his unfitness. Rather, *In re CR* supports that a non-respondent parent may be subjected to court orders, such as mandated drug screens or parenting classes, even when jurisdiction is based solely on the other parent's conduct.

If petitioner intends to proceed to termination proceedings against McEachern, it has unnecessarily complicated the matter by failing to file a petition naming McEachern as a respondent and identifying the grounds for depriving him of his son's custody.[4] Nevertheless, as of today, McEachern's due process rights remain intact. McEachern's highly competent counsel

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[4] If a supplemental petition is eventually filed and the circuit court considers terminating McEachern's parental rights, as to McEachern's fitness, the court may entertain only legally admissible evidence. MCL 3.977(F). See *In Re DMK*, 289 Mich App 246; 796 NW2d 129 (2010).

squarely placed McEachern's right to SM's custody before the court. The court denied McEachern custody based on adequate admissible record evidence supporting his unfitness. Accordingly, I concur with the majority's conclusion that McEachern's constitutional rights remain intact.

/s/ Elizabeth L. Gleicher