STATE OF MICHIGAN

COURT OF APPEALS

	UNPUBLISHED February 28, 2013
In the Matter of GADDIS/PAUL, Minors.	No. 312041 St. Clair Circuit Court Family Division LC No. 11-000248-NA
In the Matter of S. A. GADDIS, Minor.	No. 312049 St. Clair Circuit Court Family Division LC No. 11-000248-NA

Before: MURRAY, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

In this consolidated appeal, respondents Serene Paul and Deshawn Gaddis appeal from the August 13, 2012, orders terminating their respective parental rights to the minor children. Paul is the biological mother of both children, while Gaddis is the legal father of SG. On appeal, Paul only challenges the lower court's alleged deprivation of her right to counsel during the termination hearing, while Gaddis challenges the trial court's finding of a statutory ground under MCL 712A.19b(3)(g) to terminate his parental rights, as well as the court's best-interest determination. For the following reasons, we vacate the trial court's order terminating the parental rights of Paul and remand that case for further proceedings, but affirm the trial court order terminating the parental rights of Gaddis.

I. FACTUAL BACKGROUND

Petitioner initiated legal proceedings in Wayne Circuit Court to remove SG from Paul on April 8, 2011, and later filed another petition to remove AP from Paul after the child was born on September 24, 2011. The initial petition named only Paul as a respondent, and all the allegations of physical abuse and neglect pertained to Paul. With respect to Gaddis, the petition acknowledged that he appropriately cared for SG by ensuring that the child received medical treatment for a hernia and kidney problems after Paul abandoned the child with Gaddis. However, petitioner asked the court to remove the child from Gaddis's care solely because he had not established that he was the legal father of the child. Gaddis was initially unable to

establish paternity because Paul refused to sign an affidavit of parentage for Gaddis to acquire legal rights to SG.

During a hearing on August 3, 2011, the court assumed jurisdiction over the child pursuant to a no-contest plea. After the first hearing, the court ordered both parents to comply with all of petitioner's recommendations and comply with services. It is undisputed that neither parent fully complied with these services, although Gaddis did complete his parenting classes shortly before the date of the termination hearing. Only Paul was appointed counsel for the initial proceedings; the court did not appoint Gaddis counsel until after petitioner filed the termination petition on June 27, 2012.

The termination hearing was held on August 7, 2012. Before the termination hearing began, Ron Kaski — Paul's appointed counsel — informed the court that Paul intended to relinquish her parental rights, but he asked to be released as counsel because Paul was not present and he could not in her absence represent her interests during the hearing. The court agreed and released Kaski. After petitioner's sole witness testified, Paul tardily appeared at the hearing (she was just under an hour late) and reiterated her desire to release her parental rights. However, after the court informed Paul of the consequences of relinquishing her parental rights, Paul stated that she no longer wanted to release her rights because she was apparently misinformed by her counsel about the consequences of this action. The court responded:

> All right. Well, I'm not going to start over, you were suppose [sic] to be here. I've already heard evidence with regard to your involvement in this case and I'm going to proceed at this time. I'll allow you an opportunity to present whatever case you want as to why I shouldn't terminate your parental rights, but you should have been here on time.

Paul was then required to represent herself during the remainder of the hearing, which required her to present a complete defense without the assistance of counsel.

During the hearing, Leah Redman — foster care worker through Ennis Center for Children — testified that Gaddis failed to participate in any of the court-ordered services (parenting time, parenting classes, counseling, Early-On, bus passes, and a paternity test), did not complete the home study, missed half of the scheduled parenting time sessions with SG, and never followed through with scheduled appointments, allegedly due to his demanding work schedule. She also indicated that she did not make any attempt to complete Gaddis's home study because he was not cooperative with the previous foster care worker in completing the home study. Gaddis later acknowledged that he did not provide any financial or material support for SG while he was in petitioner's care.

Following closing arguments, the court terminated Paul's parental rights to AP and SG pursuant to MCL 712A.19b(3), subsections (c)(*i*), (g), and (j). The court terminated Gaddis's parental rights to SG pursuant to MCL 712A.19b(3)(g). In doing so, the court acknowledged that Gaddis was not responsible for any of the conditions that led to adjudication, properly cared for the child before petitioner removed him from Gaddis, and did not abandon the child. However, it found that petitioner proved subsection (g) because Gaddis repeatedly demonstrated that SG was not a priority in his life. The court stated:

> Mr. Gaddis had every opportunity to be involved in his child's life. He chose work instead, work and free time instead. What that indicates to the Court is that he's willing to be a father when it's not inconvenient for his other life demands.
>
> It's inconceivable to me that a person who really wants to have their child with them would not visit them for nine months, no matter what the reason was. There had to be a way to do that. That he would not follow the orders of the Court that were designed to be necessary in order to show that he could be a parent for the child. That he would not have consistent contact with the foster care worker to try and establish a basis for the child to come back to him. And the only excuse I have from him is that I had to work, and it wasn't until I was laid off that I could do something.
>
> Well, he's working again, and if that pattern continues there certainly-if work takes precedence over being a father and taking the necessary steps to care for his son and he's working again and his history of when he works he can't deal with a child, tells me that he is unable to provide proper care or custody for the child. And, there's no reasonable expectation he would be able to do so within a reasonable time considering the child's age.

Regarding the best-interest determination, the court stated as follows:

> [T]his child is less than two years old. He's been — so, it was less than twenty-four months old — he's what eighteen months, maybe twenty months olds. He's been in care for fifteen of those. His-he is somebody who requires attendance on a regular basis because of his kidney disease and his developmental delay. And the father has demonstrated, through his lack of involvement with his child, during the time the child has been in care, that he is not willing to do what's necessary in order to attend to those needs, to even visit with the child.

Accordingly, the court found that termination of Gaddis's parental rights was in the best interests of SG, and therefore terminated his parental rights.

II. RESPONDENT PAUL – ASSISTANCE OF COUNSEL

In Docket No. 312041, Paul argues that the court committed error requiring reversal by unjustly depriving her of the right to counsel during the termination hearing. We agree. In context, the court's statement requiring Paul to proceed without counsel could be interpreted as either: (1) a determination that Paul was no longer entitled to assistance of counsel; or (2) a determination that Paul impliedly waived her right to counsel by appearing late for the hearing. Either way, this Court reviews for clear error the court's factual findings used to support its determination, but "[w]hether proceedings complied with a party's right to due process presents a question of constitutional law that we review de novo." *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009) (citation omitted). "A finding is 'clearly erroneous' [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id.* (quotation marks and citation omitted).

"This Court has explicitly recognized that the United States Constitution guarantees a right to counsel in parental rights termination cases . . . [and] that the constitutional right of due process confers on indigent parents the right to appointed counsel at hearings that may involve the termination of their parental rights." *In re Williams*, 286 Mich App 253, 275-276; 779 NW2d 286 (2009) (citations omitted); US Const, Am VI; Const 1963, art 1, § 20. MCL 712A.17c(4) and (5), as well as MCR 3.915(B)(1), require the court at the first hearing to notify indigent respondents of their right to counsel in termination proceedings, and to appoint counsel when the respondent is "financially unable to retain an attorney." Although MCL 712A.17c(6) and MCR 3.915(B)(1)(c) permit a respondent to waive her right to assistance of counsel, "courts are to make every reasonable presumption *against* the waiver of a fundamental constitutional right," and a person cannot waive this right unless: (1) the waiver is unequivocal; (2) the waiver is made "knowingly, intelligently, and voluntarily;" and (3) self-representation will not disrupt the court proceedings. *People v Russell*, 471 Mich 182, 188-190; 684 NW2d 745 (2004). Although *Russell* was a criminal case involving waiver of the right to counsel, "the right to due process also indirectly guarantees assistance of counsel in child protective proceedings." *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2002) (citation omitted). Because due process guarantees other rights regarding counsel, such as the right to effective assistance of counsel, principles pertaining to waiver of the right to counsel "developed in the context of criminal law [also] apply by analogy in child protective proceedings." *Id.* at 198 (citation omitted).

In the case at bar, it is undisputed that Paul, an indigent respondent, requested counsel at the outset of these proceedings, and the court appointed counsel for Paul. When Paul failed to timely appear for the termination hearing, the court released Paul's counsel. After Paul later appeared for the hearing and indicated that she was not willing to voluntarily release her parental rights — apparently she was operating under a misperception about her control over where the children would end up after termination — the court indicated that the hearing would proceed, so Paul would have to represent herself for the remainder of the hearing. The court gave no basis for this decision, other than an apparent unwillingness to adjourn the case to a later date. However, there is no evidence of record from which the court could have inferred that Paul was knowingly, intelligently, and voluntarily waiving her right to counsel, as evidenced by the fact that the court simply proceeded with the hearing without notifying Paul of her right to counsel. While it may have been appropriate for the court to refuse to allow Paul to have a completely new hearing and recall the previous witness (Redman) for cross-examination, petitioner presents no legal support to justify the court's failure to protect Paul's previously-invoked right to assistance of counsel during a termination hearing.

Petitioner notes that in *In re Hall*, 188 Mich App 217, 222; 469 NW2d 56 (1991), this Court held that a party can waive or relinquish his or her right to counsel through conduct that "effectively terminate[s] the attorney-client relationship." However, the parent in *In re Hall* did not participate in the case or have contact with her attorney for sixteen months during the pendency of the proceedings. *Id.* Here, it is undisputed that Paul had been in contact with her attorney shortly before the hearing, as her attorney was able to express Paul's intent to relinquish her parental rights. As they maintained a minimum level of contact, there was no complete breakdown of the attorney-client relationship that could rise to the level of a constructive waiver of the right to counsel.

Petitioner also argues that Paul waived her right to counsel by agreeing to proceed on the hearing without reasserting her right to counsel. However, based on the court's statement, it would not have been clear to Paul that she retained the right to ask for counsel, as the court implied that she gave up her right to counsel by arriving late to the hearing. In any event, Paul's silence in this context cannot rise to the level of a knowingly, intelligently, and voluntarily-made waiver of her right to counsel.[1]

Finally, we note that "[a]n erroneous deprivation of appointed counsel for child protective proceedings can be subject to a harmless error analysis." *In re Williams*, 286 Mich App at 278 (citation omitted). However, the court's error does not qualify as harmless because the decision effectively deprived Paul of her properly and timely-invoked right to assistance of counsel during a hearing in which the court terminated her parental rights. As Paul was required to present a complete defense in her case without the benefit of counsel, this error "affected the fundamental fairness of the proceedings[.]" *Id.* Accordingly, Paul is entitled to a new termination hearing on remand.

III. RESPONDENT GADDIS – MCL 712A.19B(3)(G)

In Docket No. 312049, Gaddis argues that the court committed clear error in finding that petitioner proved, by clear and convincing evidence, the statutory ground under MCL 712A.19b(3)(g) to terminate his parental rights to SG. This Court reviews for clear error the trial court's factual findings and determination that a statutory ground for termination has been established. MCR 3.977(E)(3); MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

The trial court may terminate the parental rights of a parent if it finds a statutory ground to do so, as established in the juvenile code. *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). The trial court found that petitioner proved the statutory ground in MCL 712A.19b(3)(g), which permits the court to terminate a parent's parental rights if:

> (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.

Petitioner bore the burden of establishing the above statutory ground for termination by clear and convincing evidence. *In re JK*, 468 Mich 202, 211; 661 NW2d 216 (2003). Clear and convincing evidence is evidence that creates

> in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and

[1] Although petitioner implies that the court reasonably refused to provide counsel to Paul because she was previously willing to relinquish her parental rights, such a conclusion is based on pure speculation as to how Paul ultimately wanted to proceed.

> convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009) (quotation marks and citation omitted).]

Based on the record, we cannot conclude that the trial court clearly erred in finding that the statutory ground was proven by clear and convincing evidence. A parent's failure to comply with the required services in their parent-agency agreement may be used as evidence of his or her failure to provide proper care and custody for the children. *In re JK*, 468 Mich at 214.

As previously noted, the trial court terminated Gaddis's parental rights to SG pursuant to MCL 712A.19b(3)(g). The court found that petitioner proved subsection (g) because Gaddis repeatedly demonstrated that SG was not a priority in his life, specifically concluding as follows:

> Mr. Gaddis had every opportunity to be involved in his child's life. He chose work instead, work and free time instead. What that indicates to the Court is that he's willing to be a father when it's not inconvenient for his other life demands.
>
> It's inconceivable to me that a person who really wants to have their child with them would not visit them for nine months, no matter what the reason was. There had to be a way to do that. That he would not follow the orders of the Court that were designed to be necessary in order to show that he could be a parent for the child. That he would not have consistent contact with the foster care worker to try and establish a basis for the child to come back to him. And the only excuse I have from him is that I had to work, and it wasn't until I was laid off that I could do something.
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> Well, he's working again, and if that pattern continues there certainly-if work takes precedence over being a father and taking the necessary steps to care for his son and he's working again and his history of when he works he can't deal with a child, tells me that he is unable to provide proper care or custody for the child. And, there's no reasonable expectation he would be able to do so within a reasonable time considering the child's age.

Because there was record evidence supporting these findings, we cannot conclude that clear error occurred. As the trial court found, Gaddis did not meet his obligations to the child, despite having employment to do so. His visitation with the child — and his contact with DHS — was at best inconsistent, and he never once provided any financial support for the child, again despite having the ability to do so. In light of these facts, and given the child's serious medical issues that require constant monitoring, the trial court did not clearly err in ruling that, without regard to intent, there was no reasonable expectation that Gaddis would be able to provide proper care and custody to the child within a reasonable time. Although we consider this conclusion to be a close call, we cannot overturn the trial court's decision merely on the basis that we may have rendered a different decision had we been deciding this case in the first instance. *Black v Dep't of Social Servs*, 195 Mich App 27, 30; 489 NW2d 493 (1992).

Regarding the best-interest determination, the court found that termination of Gaddis's parental rights was in the best interests of SG for the following reasons:

> [T]his child is less than two years old. He's been — so, it was less than twenty-four months old — he's what eighteen months, maybe twenty months old. He's been in care for fifteen of those. His — he is somebody who requires attendance on a regular basis because of his kidney disease and his developmental delay. And the father has demonstrated, through his lack of involvement with his child, during the time the child has been in care, that he is not willing to do what's necessary in order to attend to those needs, to even visit with the child.

Again, the trial court's best interest findings did not constitute clear error. The facts established that SG required significant and constant medical care, and Gaddis had failed to demonstrate any ability to, or interest in learning how to, care for Gaddis. The evidence also supported the trial court's decision that SG could not wait longer in the hope that Gaddis would eventually become actively involved in his care.

IV. CONCLUSION

For the foregoing reasons, we vacate the court's order terminating the parental rights of Paul and remand for further proceedings consistent with this opinion. We affirm the trial court order terminating the parental rights of Gaddis to SG. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Kurtis T. Wilder
/s/ Donald S. Owens