STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SPENCER, Minors.

UNPUBLISHED
October 15, 2013

No. 315658
Kent Circuit Court
Family Division
LC No. 11-050721-NA

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Respondent mother appeals as of right the trial court order terminating her parental rights to the minor children under MCL 712A.19b(3)(c)(*i*), (g), and (j). We affirm.

Respondent first argues that the trial court denied her procedural due process by refusing to grant her motion for an adjournment the morning of the termination hearing so that she could retain counsel *in addition* to her appointed counsel. This unpreserved issue is reviewed for plain error affecting substantial rights. *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011).

During the pendency of this nearly two-year long case, respondent was represented by appointed counsel. At 4:59 p.m. on Monday, March 11, 2013, the day before the termination hearing began, respondent called the trial court and left a message requesting an adjournment so that she could retain her own counsel in addition to appointed counsel. At the beginning of the termination hearing on Tuesday, March 12, 2013, appointed counsel informed the trial court that respondent first talked to the attorney she wanted to retain on that very morning, and he refused to represent respondent in this case. Appointed counsel then moved the trial court for a two or three week adjournment so that respondent would have the time to hire another attorney. Appointed counsel represented that respondent had only recently gained the financial ability to hire her own attorney. He clarified that respondent was not asking that appointed counsel be removed from the case. Rather, she wanted an adjournment to hire an attorney who could help appointed counsel. Specifically, respondent felt that "another attorney would be of significant help to her."

The trial court denied respondent's motion on four grounds. First, the trial court pointed out that the case had already carried on for 23 months and that the earliest date to which the hearing could be adjourned was May 16, 2013. Second, the trial court pointed out that respondent was told at a hearing on December 12, 2012 that the termination hearing was to begin on March 12, 2013, yet respondent failed to obtain counsel in the intervening 90 days. Third, the

trial court noted that respondent did not want to fire her existing appointed counsel and merely wanted supplemental counsel. Finally, the trial court noted that respondent did not raise her request for an adjournment to obtain her own counsel until the day before the hearing began, and then only through a telephone message.

Respondent argues that under *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976), she had a procedural due process right to an adjournment so that she could retain additional counsel for her termination hearing. In *In re Brock*, 442 Mich 101, 110-111; 499 NW2d 752 (1993), the Michigan Supreme Court explained procedural due process in the context of a termination proceeding:

> "Due process applies to any adjudication of important rights." *In re LaFlure*, 48 Mich App 377, 385; 210 NW2d 482 (1973).
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> > Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.
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> > "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." [*Mathews*, 424 US at 332, 334.]
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> Due process requires fundamental fairness, which is determined in a particular situation first by "considering any relevant precedents and then by assessing the several interests that are at stake." *Lassiter v Dep't of Social Services*, 452 US 18, 25; 101 S Ct 2153; 68 L Ed 2d 640 (1981). Generally, three factors will be considered to determine what is required by due process:
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> > First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews*, 424 US at 335.]

Under *Mathews*' first factor, respondent is correct that "parents have a due process liberty interest in caring for their children and that child protective proceedings affect that liberty interest." *In re CR*, 250 Mich App 185, 204; 646 NW2d 506 (2002) (quotation marks and citation omitted). Under *Mathews*' second factor, respondent argues that the denial of an adjournment created a strong risk of an erroneous deprivation of that interest because the "obvious lack of confidence that she had for her appointed lawyer clearly suggests that an advocate with whom she had confidence would present an entirely different case for her." The record does not support that respondent lacked confidence in appointed counsel. Rather, respondent repeatedly indicated that she needed an adjournment to retain "additional legal counsel." Respondent was not asking that appointed counsel be removed from the case; she

wanted an adjournment to hire an attorney who could help. The only reason respondent gave to the trial court to retain additional counsel was that she felt that "another attorney would be of significant help to her." She did not explain how another attorney would be of "significant help," and she provides no explanation for what her "entirely different case" would have been. Respondent simply failed to meet her burden of providing a factual basis for her assertion that there was a strong risk of an erroneous deprivation of her interest in parenting her children because of the trial court's refusal to grant her an adjournment. *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993). The record also does not support, and respondent makes no offer to support, that allowing an adjournment to seek additional counsel would have had any probable value.

Finally, under *Mathews*' third factor, respondent argues that the administrative burden of a delay of the termination hearing for a mere 14 to 21 days would pale in comparison to the gravity of respondent mother's interest in raising her children. However, the primary governmental interest in this case was the minor children's welfare, *In re MU*, 264 Mich App 270, 281; 690 NW2d 495 (2004), and as of the March 12, 2013 termination hearing, the minor children had been wards of the trial court for 23 months. Consequently, the trial court properly denied respondent an adjournment because the minor children had already been wards of the trial court for 23 months, and would have been in that condition another two months if an adjournment were granted.

In sum, while respondent had a due process liberty interest in caring for her children, she fails to demonstrate plain error in her claim that the trial court erred as a matter of procedural due process in denying her an adjournment. *Brock*, 442 Mich at 110-111; *VanDalen*, 293 Mich App at 135.

Moving on, respondent asserts two reasons why the trial court clearly erred in finding that termination of respondent's parental rights was in the minor children's best interests. First, respondent argues that the trial court erred because it failed to consider the fact that the children were bonded to her. However, the trial court properly considered respondent's failure to comply with her treatment plan, *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001), and the minor children's need for permanence and stability. *In re McIntyre*, 192 Mich App 47, 52; 480 NW2d 293 (1991). Thus, while not every factor favored the termination of respondent's parental rights, the factors found within the whole of the record supported termination. *In re Trejo Minors*, 462 Mich 341, 354; 612 NW2d 407 (2000). And, we note that the existence of a bond, even a strong bond, may be outweighed by other considerations, such as a child's need for permanency and stability. *In re LE*, 278 Mich App 1, 29-30; 747 NW2d 883 (2008). The trial court's best-interest finding was not clearly erroneous. MCR 3.977(K); *Trejo Minors*, 462 Mich at 356-357.

Second, respondent argues that the trial court failed to explicitly consider the best interests of each child individually as required by *In re Olive/Metts Minors*, 297 Mich App 35; 823 NW2d 144 (2012). In *Olive/Metts*, the three older children were placed in one home while the two younger children were placed with a relative. *Id*. at 43-44. While the trial court in *Olive/Metts* considered the facts relevant to the best interests of the older children, the trial court failed to consider the best interests of the younger children in the context of their placement with a relative. *Id*. On appeal, the *Olive/Metts* Court held that a "trial court has a duty to decide the best interests of each child individually" and that a "trial court's failure to explicitly address

whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal." *Id*. at 42-43. Accordingly, the *Olive/Metts* Court held that the trial court clearly erred in failing to "consider the best interests of each child individually and . . . each child's placement with relatives at the time of the termination hearing if applicable . . . ." *Id*. at 44. The *Olive/Metts* Court remanded the case for specific best-interest determinations in regard to the two younger children, whose situation had not been considered. *Id*. However, the *Olive/Metts* Court did not remand the case regarding the three older children, despite the fact that there was no indication that the trial court made explicit best-interest findings in regard to the older children. *Id*. Thus, the *Olive/Metts* Court implicitly held that general best-interest findings that are equally applicable to several children may be sufficient in termination proceedings, provided that a child's placement with a relative is not disregarded.

In this case, the minor children were not placed with relatives. The trial court found that termination was in the minor children's best interests because the children would be at a substantial risk if they were returned to respondent's home due to her failure to comply with her treatment plan and because the children needed permanency and stability. These findings were based on best-interest evidence that applied equally to each child. Therefore, reversal is unwarranted.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello