2013 IL App (1st) 122132-U

FOURTH DIVISION
January 10, 2013

Nos. 1-12-2132 & 1-12-2134 (Consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re S.J. & T.J., Minors,	)	Appeal from the
(THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
Petitioner-Appellee,	)	Cook County
	)	
v.	)	No. 06 JA 00910
	)	No. 06 JA 00911
M.C. & K.J.,	)	
	)	Honorable
Respondents-Appellants.)	)	Robert Balanoff,
	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not violate procedural due process rights of respondent when it denied his request to have ten-year-old child testify at best interest hearing, where the court was concerned about stress and emotional harm to child, other witnesses testified as to child's wishes and long-term goals, and respondent was allowed to meaningfully participate in the best interest hearing.

¶ 2 Respondent M.C. appeals from the trial court's order terminating his parental rights with respect to his son, S.J. Respondent K.J., S.J's mother, filed a separate appeal challenging the trial court's order terminating her parental rights with respect to S.J. and his brother, T.J. The appeals

were consolidated. For the reasons that follow, we affirm.

¶ 3 No. 1-12-2132

¶ 4 We first address K.J.'s appeal. Court-appointed counsel for K.J. has filed a motion for leave to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and a supporting brief based on the conclusion that there are no meritorious issues to be raised on appeal. Copies of the brief and motion were sent to K.J., and she was advised that she might submit any points in support of this appeal. K.J. responded. We have carefully reviewed the record in this case, counsel's motion and memorandum, and K.J.'s response. We agree that there are no issues of arguable merit in this appeal. Therefore, we grant counsel's motion and affirm the judgment of the circuit court.

¶ 5 No. 1-12-2134

¶ 6 We review the facts relevant to the issues raised in M.C.'s appeal. M.C. is the biological father of S.J., born in 2002. S.J. has an older brother, T.J., born in 1998, who is not M.C.'s son. K.J. is the mother of both boys. A petition for adjudication of wardship for the minors was filed on December 19, 2006. The petition alleged that (1) K.J. had one prior indicated report of physical harm to T.J.; (2) K.J. stated to DCFS personnel that she would allow M.C. to return to her residence despite the existence of a current order of protection; (3) T.J. stated that M.C. hit him in the forehead with a baseball bat in early December 2006; and (4) law enforcement personnel observed a bruise on T.J.'s forehead. On December 19, 2006, temporary custody of the boys was granted to J.J., the boys' maternal grandmother, who had taken protective custody of the boys on December 15, 2006. An adjudication order was entered on May 29, 2008, for both

minors, finding that they were abused and neglected due to an injurious environment and substantial risk of physical injury. A disposition order was entered on November 19, 2008, finding the parents unable to care for, protect, train, or discipline the minors. The minors were placed in the guardianship of a Department of Child and Family Services (DCFS) administrator with the right to place the minors.

¶ 7 On July 28, 2011, the State filed a motion to terminate M.C.'s and K.J.'s parental rights. The State alleged that M.C. was unfit on the following grounds: (1) he had failed to maintain a reasonable degree of interest, concern, or responsibility as to the boys' welfare; (2) he had behaved in a depraved manner; and (3) he had failed to make reasonable efforts to correct the conditions which were the basis for the boys' removal from them, or had failed to make reasonable progress toward return home within 9 months after the adjudication of neglect or abuse under the Juvenile Court Act. See 750 ILCS 50/1(D)(b), (i), (m) (West 2010). The motion further alleged that it was in S.J.'s best interest to terminate parental rights and that he had been placed in a pre-adoptive home since December 15, 2006. M.C. filed a response, denying all allegations against him.

¶ 8 On January 23, 2012, M.C. filed a notice to produce S.J. to testify at the termination hearing pursuant to Illinois Supreme Court Rule 237(b) (Ill. Sup. Ct. R. 237(b) (eff. Jan. 1, 2006)). The State filed a motion to quash. At a hearing on the motion, the Assistant Public Guardian reported that, as of that date, S.J. wanted to testify. The Assistant Public Guardian requested several parameters should S.J. testify: (1) he would be the first witness to testify at the best interest hearing; (2) the Assistant Public Guardian would conduct the examination; (3) S.J.

would testify in chambers; and (4) only the attorneys for the parties be present for the testimony. The Assistant Public Guardian further reported that S.J.'s therapist would appear in court to support S.J. if he was required to testify, but the therapist had concerns about S.J. testifying. The State argued that it was not in S.J.'s best interest to testify and that his wishes could be communicated through the testimony of other witnesses, such as S.J.'s caseworkers and his therapist. The court granted the State's motion to quash, noting that it was concerned that the child would mistakenly believe that, through his testimony, he was responsible for ending his relationship with his parents: "[my] biggest concern is that, the child will somehow think for the rest of his life that whatever he said had an [e]ffect one way or another." The court noted, however, that if the child's wishes were not apparent from the testimony of other witnesses, the termination hearing could be continued until another date. The Assistant Public Guardian reiterated that it would make S.J. available if he wished to testify.

¶ 9 At the fitness hearing for M.C. and K.J., the court heard testimony from three caseworkers for the family. They testified that several service plans had been set by the family and DCFS in order to achieve a court-set permanency goal. Under those plans, M.C. was required to participate in various services, including substance abuse treatment, random urine drops, self help groups, medication monitoring, domestic violence counseling, anger management, individual counseling, and family counseling. According to the caseworkers, M.C.'s progress under the service plans was largely unsatisfactory, as he was often incarcerated and unable to attend or be involved with the services. The court received into evidence certified copies of M.C.'s twelve convictions between 1998 and 2008. At the conclusion of all the

evidence, the trial court held that there was clear and convincing evidence that both parents were unfit to care for S.J. or T.J. In finding M.C. unfit, the court stated that if he cared about S.J. and wanted to be involved in his life, he would have avoided the criminal activity that led to his frequent incarceration. The court also found that M.C. never completed the required services, including domestic violence and individual counseling; he never achieved unsupervised visits; and he did not comply with the court's orders regarding drug drops.

¶ 10 At a hearing on the best interests of the children, the court first heard testimony from caseworker Cherish Williams. Williams testified that the boys lived with their maternal grandmother, J.J., and it had been their only placement since they had been in the system. On Williams recent visit to J.J.'s home, she found that it was safe and appropriate, there were no signs of abuse, neglect, or corporal punishment, and there have been no unusual incidents. Only J.J. and the boys lived in the home.

¶ 11 Williams testified that S.J., who took psychotropic medication for ADHD, received individual therapy at the Helen Wheeler Center. T.J., who took psychotropic medication for ADHD and anxiety, also had been in therapy. J.J. was searching for a new counselor because the former counselor was in a contract dispute with her employer. T.J. was exhibiting some adolescent-related problematic behaviors, such as smoking. Both boys had current medical, dental, hearing, and vision examinations. Williams had no concerns regarding J.J.'s ability to meet the boys' mental health needs or advocate for them in school.

¶ 12 Williams talked with the children about their long-term wishes. She noted that both children "were up for" living long-term with J.J. and that S.J. expressed a "desire to still maintain

contact with his natural parents and see[] them if he could." S.J. recognized M.C. as his father and enjoyed visits with him, and he had requested extended time during some visits. S.J. expressed a desire to live with J.J. but visit M.C. and K.J. at their home. Williams testified that S.J. may be confused if contact with M.C. was abruptly cut off, but she noted that he could start contact with telephone calls. Based on her work and involvement with S.J., Williams stated that S.J. did not understand the difference between adoption and termination. S.J. therefore did not understand that he would have no legal right to visit his parents or speak with them by telephone. Williams believed that it was in the boys' best interests to terminate parental rights because the parents "failed to make progress towards reunification" and the boys had lived in a pre-adoptive home where they were "integrated" and "thriving."

¶ 13 J.J. testified that she wanted to adopt the boys, who had lived with her for five-and-a-half years. She stated that she would be able to meet their educational needs and care for them. The boys went to school in her neighborhood and had friends in the area. J.J. had attended family counseling with the minors, though the boys were attending without her at the time of the hearing. J.J. stated that sometimes she would not make the boys take their psychotropic medicine on the weekends, but she supervised them during these times. She stated that the doctor who administered the boys' medication told J.J. that they could have a break from the medication during the summer.

¶ 14 J.J. testified that if something happened to her, her older brother in Indiana, who is over 60 and recently had bypass surgery, could provide backup care. Both children had a relationship with the brother, who visited the children during the year. One of J.J.'s daughters also sometimes

helped with the boys, though the daughter had some problems with DCFS in the past.

¶ 15 J.J. stated she would be willing to allow the children to speak with M.C. and K.J., provided that the children wanted to speak with them. She noted that S.J. had been upset by the calls in the past and sometimes did not wish to speak with his mother. J.J. testified, however, that she would not allow for physical contact at the time because everything with M.C. and K.J. was "in turmoil." While J.J. stated that it was important for a child to have contact with his father, S.J. had "taken on the parent's role when he talks to his dad about him being good and not doing bad things."

¶ 16 Counsel for M.C. then asked J.J. if S.J. wanted to come in to court. J.J. responded that at some point he did, but he had changed his mind because he wanted to attend a field trip instead. J.J. stated that S.J. had something he wanted to tell the judge; when asked if she knew what he wanted to tell the judge, J.J. explained that she did because S.J. wrote a letter to the judge.

¶ 17 Counsel for M.C. then renewed his request for S.J. to be present in court to testify and asked that S.J.'s letter be admitted into evidence. Counsel also made an offer of proof that if S.J. were to testify, he would state that he was not afraid to testify; his therapist had not questioned him about his wishes regarding his father; he loved his father and wished to have more visitation with him; and he did not wish for his parents' rights to be terminated. Both the Assistant Public Guardian and the State objected to M.C.'s request to have S.J. testify and to M.C.'s offer of proof, and the State objected to M.C.'s request to admit S.J.'s letter into evidence. The Assistant Public Guardian noted that although it had agreed to make S.J. available, S.J. no longer wanted to come in and testify. The court ruled that S.J. should not testify "for his own protection," reasoning that

"a ten year old does not necessarily know what's best for him" and "[t]here are other ways to get his beliefs and desires into this court hearing which I think they have been." S.J.'s letter was not read into evidence. M.C. did not request a continuance and rested his case.

¶ 18 K.J. testified on her own behalf. She stated that she loved the boys and would "lay down and die" for them. K.J. stated that her sister was a foster parent, but was charged with sexual abuse and abusing the foster children in her home, so DCFS removed the children. K.J. denied that she forced the boys to speak to her on the telephone. K.J. testified that it "breaks her heart" that she may not have contact with the boys if the court were to terminate her parental rights.

¶ 19 In ruling on the best interests of S.J. and T.J., the court noted that M.C. could have forged a stronger relationship with S.J. if he had not been incarcerated for long periods of time over the past several years. He noted that if M.C. truly loved S.J., he would not have committed several crimes that sent him to jail. As to K.J., the court noted that while she claimed she would do anything for the boys, she would not leave M.C. for them. While the court had hoped that somehow the family would be reunited, the court noted that M.C. had six years to reunite with his family but had not. As to the foster home provided by J.J., the court found that it was safe and appropriate and J.J. would be committed to the children for the long term. The court concluded that it was in the best interest of S.J. and T.J. that the parental rights be terminated for M.C. and K.J. This appeal followed.

¶ 20 ANALYSIS

¶ 21 On appeal, M.C. does not challenge the court's determination that he is unfit, but raises a single issue regarding the trial court's best interest determination. M.C. contends that, at the best

interest hearing, his due process rights were violated, where the court did not allow his Illinois Supreme Court Rule 237(b) notice to produce S.J. to testify and the court did not admit the child's letter into evidence.

¶ 22 The fourteenth amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. "The due process clause 'guarantees more than fair process' as it also 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' " In re M.H., 196 Ill.2d 356, 362 (2001) (quoting Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997)). Among these liberty interests is the right to establish a home and raise children, and thus "the procedures involved in terminating parental rights must meet the requisites of the due process clause." *Id.* at 362-63.

¶ 23 In determining whether procedures followed in a parental rights termination proceeding satisfied the constitutional requirements of procedural due process, Illinois courts have applied the test announced in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Id. at 362. In *Mathews*, the Court identified three factors to be considered in determining what due process requires: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute safeguards would entail. *Mathews*, 424 U.S. at 335.

¶ 24 There is no question that M.C. has a liberty interest in maintaining his parental

relationship with S.J. See M.H., 196 Ill. 2d at 362; In re D.R., 307 Ill. App. 3d 478, 482-84 (1999); In re M.R., 316 Ill. App. 3d 399, 402-03 (2000). The question here is whether the procedures used by the circuit court in determining the child's best interest led to an erroneous deprivation of M.C.'s parental rights. Noting that "the child's wishes and long-term goals" are among the statutory factors relevant to determining the child's best interest (705 ILCS 405/1-3(4.05)(e) (West 2010)), M.C. argues that court could not adequately assess S.J.'s wishes and long-term goals without hearing from S.J.'s testimony or admitting into evidence a letter S.J. wrote to the court.

¶ 25 To start, we note that while M.C. presents his case as a due process violation, the alleged violation of his rights stems from evidentiary rulings of the trial court. Those rulings are within the discretion of the trial court and will not be overturned absent an abuse of discretion. *In re A.W., Jr.*, 397 Ill. App. 3d 868, 873 (2010); People v. Becker, 239 Ill. 2d 215, 234 (2010). A trial court abuses its discretion where its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *Becker*, 239 Ill. 2d at 234. M.C. recognizes the trial court's considerable discretion in evidentiary matters, but argues that because the trial court's evidentiary rulings "cannot even remotely be called reasonable," his due process rights were violated.

¶ 26 The trial court determined that it was in the best interest of S.J. not to have him testify in light of the inherent emotional risks associated with testifying. This court has previously found no abuse of discretion, and no resulting deprivation of due process rights, when a trial court denied a request to have a child testify after determining that requiring a child to testify "would

be detrimental to his best interest" because of the stress of testifying. *In re A.W., Jr.*, 397 Ill. App. 3d at 871, 874; see also *In re Mark W.*, 383 Ill. App. 3d 572, 589-90 (2008) (finding no abuse of discretion when trial court denied request to have minor child testify at termination of parental rights proceeding, where therapist stated that requiring testimony "could hinder child's emotional stability"). We have noted that the "the stress and pressure placed on children that are requested to testify in this setting" is a proper consideration in a termination proceeding, as the courts must administer the Juvenile Court Act "in a spirit of humane concern, not only for the rights of the parties, but for the fears and limits of understanding of all who appear before the court." *In re A.W., Jr.*, 397 Ill. App. 3d at 874 (quoting 705 ILCS 405/1-2(2) (West 2010)).

¶ 27 M.C. argues that such concerns were unfounded in this case, however, because S.J. wanted to testify. When reviewing the proceedings, including the Rule 237(b) and best interest hearings, we find no abuse of discretion in the trial court's rulings. Where other witnesses were available and in fact did testify as to the child's wishes, it was not unreasonable for the trial court to avoid possible emotional trauma to S.J. by requiring him to testify.

¶ 28 We acknowledge that at the hearing on M.C.'s notice to produce, the Assistant Public Guardian did report that S.J. expressed an interesting in testifying, and the Assistant Public Guardian would not contest S.J.'s wishes, so long as S.J. could testify *in camera*, with the aid of his therapist and with only the attorneys present. But the Assistant Public Guardian also acknowledged that S.J.'s therapist had concerns about him testifying, noting that at his age, S.J. had limited "ability to truly understand what's going on" and that putting "a legal face to what he knows in his heart may be jarring for him." The court noted its concern with the potential

emotional harm that could result from S.J. misunderstanding how his testimony affected the outcome of the proceedings:

> "I guess my biggest concern is that, the child will somehow think for the rest of his life that whatever he said had an [e]ffect one way or another. I don't want him—That burden is mine; not his."

Importantly, while the court granted the motion to quash, it did not bar S.J. from testifying at the best interest hearing. After explaining that M.C. could present S.J.'s wishes through the testimony of his caseworker and therapist (if the therapist was called to testify), the court further noted that "if after the testimony on the best interest I need to hear from the child, we can certainly continue it for another date to hear from the child." The Assistant Public Guardian again stated that if S.J. wished to testify at the best interest hearing, it would make S.J. available, so long as various safeguards were in place.

¶ 29 By the time of the best interest hearing, however, S.J. had told the Assistant Public Guardian that he did not want to testify. S.J.'s maternal grandmother, J.J., confirmed that S.J. did not want to come to court, noting that S.J. had a field trip at school that he wanted to attend. The court denied M.C.'s renewed motion to have S.J. testify, reiterating his previous concern about the potential stress on the child. The court noted that S.J. was uncomfortable during telephone contact with his parents and was worried about disappointing them. M.C. now argues, however, that the trial court simply applied a "blanket policy that a minor never be allowed to testify *** regardless of whether or not it would be injurious to the minor to do so." M.C. points to a statement from the trial judge that, in his years on the bench, "there's never been a child who's

come into a [termination of parental rights hearing] to express their desires." We first note that this remark was made in response to the contention of counsel for M.C. that due process required that M.C. depose S.J., file interrogatories, and have S.J. testify so that the court could learn his wishes. In context of the remarks that followed, it is clear the trial judge was not describing a "blanket policy" of never allowing testimony from child witnesses; rather, he was explaining that, in his experience, it is not the testimony of a young child that controls the court's best interest decision: "The fact is I would not look at a ten year old and say oh yeah let me listen to a ten year old because they know what's best for them. *** I've heard his wishes and desires throughout the years. I certainly can ascertain what might be best for him by the testimony of his foster parent and the caseworkers, and the parent. But we normally don't allow ten year olds to decide." The trial court's evidentiary ruling reflects a genuine concern that requiring S.J. to testify "would be detrimental to his best interest." *In re A.W., Jr.*, 397 Ill. App. 3d at 871, 874.

¶ 30 M.C. argues that the trial court should "at least" have admitted the letter S.J. wrote to the court. The court did not receive S.J.'s letter into evidence based on a concern that S.J. might believe that what he wrote in the letter would control the hearing's outcome. Even if it would have been preferable for the trial court to admit the letter S.J. wrote to the court, any error was harmless under the facts of this case. The court was able to ascertain the child's wishes and long-term goals from other testimony at the best interest hearing. Williams provided detailed testimony about S.J.'s relationship with M.C., and she explained that S.J. wanted to stay with J.J. and live every other week with his parents. Through this testimony, the court was given a clear impression that the child had a relationship with his father, enjoyed spending time with him, and

did not want to be permanently separated from him. Where the court heard testimony of S.J.'s wishes and long-term goals, the trial court's decision not to require S.J. to endure the stress of testifying was not an abuse of discretion. *In re A.W., Jr.*, 397 Ill. App. 3d at 873. Even if the refusal to admit S.J.'s letter constitutes error, the error was harmless in light of the evidence presented at the best interest hearing. See *id.* (concluding that trial court did not abuse its discretion in denying request for child to testify regarding his wishes where testimony would be cumulative and exclusion of evidence did not materially affect the outcome).

¶ 31 Accordingly, we conclude that M.C. has failed to establish a violation of his procedural due process rights. Ultimately, the trial court did not ignore the child's wishes and long-term goals when making the best interest determination. As noted above, the court had "heard [S.J.'s] wishes and desires throughout the years" and at the best interest hearing. M.C. fails to explain how this evidence was inadequate to convey S.J.'s wishes. Moreover, M.C. otherwise had the opportunity to be heard, explain his position, present evidence, and rebut the State's evidence. Where M.C. could meaningfully participate in the proceedings and was allowed to explore the child's wishes through the testimony of those witnesses called, as well as other witnesses he wished to call, M.C. was afforded adequate procedural due process at the best interest hearing. See *In re A.W., Jr.*, 397 Ill. App. 3d at 873. We therefore conclude that the court's evidentiary rulings did not result in the erroneous deprivation of M.C.'s parental rights.

¶ 32 CONCLUSION

¶ 33 In appeal No. 1-12-2132, we grant counsel's motion for leave to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and affirm the trial court's order terminating the

parental rights of K.J. In appeal No. 1-12-2134, we affirm the trial court's order terminating the parental rights of M.C.

¶ 34 No. 1-12-2132, Motion granted and judgment affirmed.

¶ 35 No. 1-12-2134, Affirmed.