

2009 Case Law Update

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Michigan Supreme Court Decisions

- In re Ayden Rood, Supreme Court No. 136849 (entered on April 2, 2009)
 - Facts: After the child's removal from BM, DHS made very limited efforts to contact BF. BF made initial effort to contact. Attended court hearings when given proper notice. Didn't want custody of the child if BM was going to get him. Adequately caring for another child at home.
 - DHS' efforts consisted one phone call (to an outdated number), didn't call the number given by the father at a court hearing, no contact through mail. Months between efforts. Court sent notice to the wrong addresses.
 - 14 months between contacts. During that time father didn't visit the child or provide financial support (no order). Rights subsequently terminated based on lack of involvement, criminal convictions, failure to pay child support.

Rood

- Issue before the Court: Does the failure to make reasonable efforts and the failure to give BF adequate notice about the proceeding warrant the reversal of the TPR decision?
- Supreme Court: Yes
- “Fundamental liberty interest of natural parents . . . does not evaporate simply because they have not been model parents.”
- “When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”

Rood

- DHS failed to make reasonable efforts to reunify family.
 - Must notify all parents of court hearings
 - ISP must involve both parents
 - Child placed in most family-like setting; obligation to identify and consult with relatives
- “The state’s failures of notice directly affected respondent’s substantial rights because his lack of participation in the earlier proceedings and service plans prevented the court from meaningfully considering whether respondent could become capable of caring for his child within a reasonable time.”

Rood

- BF's culpability did not excuse or mitigate the state's failure to comply with its statutory duties.
- Bottom line: DHS must take reasonable efforts seriously, must include BOTH parents in the development of service plans, must adequately assess BOTH parents for reunification, and must make sure parents get proper notice for every hearing. Can't wait for TPR to search for the other parent.

In re Hudson-Morgan, Supreme Court No. 137362 (entered on April 8, 2009)

- Facts: Petition filed regarding three children, Children remain in home with BM and BF after filing of petition. Concerns include conditions of the home, drug use, mental health issues, financial issues. No attorney appointed for BM and BF at the preliminary hearing. BM and BF enter into a plea for jurisdiction at preliminary without attorney. Not advised that plea can be used against them in TPR case.
- Children subsequently removed. BF drops out of the picture. BM participates in the service plan: therapy, drug treatment, obtains employment, visits children regularly.

Hudson Morgan

- Facts continued: Oldest child bounces around to 4 foster homes; youngest two children physically disciplined in foster home causing them to move to another home.
- DHS files TPR petition. Children do not want parental rights terminated. Oldest child is 16 at the time of TPR hearing. DHS concerned that BM doesn't have adequate housing; consistent employment, continued drug use, ongoing relationship with BF, mental health issues, special needs of children.
- Counsel appointed for BM two weeks before hearing. Trial court terminates BM's rights.

Hudson Morgan-Court of Appeals Decision

- COA reverses TPR decision.
- "Obvious dearth of evidence supporting any of the statutory grounds invoked by the circuit court."
- Questions before the Michigan Supreme Court.
 - Was there sufficient evidence to terminate parental rights?
 - Did the trial court commit procedural errors that warrant reversal?

Hudson-Morgan: Supreme Court Decision

- Supreme Court affirms the judgment of the Court of Appeals.
- Trial court committed clear error in finding that evidence existed to terminate parental rights.
- Trial court committed plain error in failing to adequately advise the respondent of the right to counsel, in failing to timely appoint counsel and in failing to advise her that her plea could be used against her in a subsequent TPR case.

In re Lee, Supreme Court No. 137653, (entered on July 14, 2009)

- Facts: BM (former foster child) was a member of a Native American tribe. Had four children. Rights to three of them had been terminated. In those cases, services were provided to BM. Last service provided in 2005.
- Jaden removed in 2001 due to neglect; child protective case closed in 2002 when placed with PGM under a limited guardianship. BM obtained custody of Jayden, he re-entered foster care and ultimately his father was given full-custody in 2004; BM had visitation rights.

Lee

- BF gets arrested in 2007, DHS files petition, court obtains jurisdiction over Jayden through BF and the DHS immediately moves for TPR based on prior terminations w/o offering services to mother.
- Jaden was having unsupervised weekend visits with his mother for four years prior to the time of the petition's filing, enjoyed visits and wanted a relationship with his mother. Trial court terminated parental rights.

Lee-Court of Appeals' Decision

- Affirmed trial court's decision to terminate parental rights.
- Formal and informal services provided prior to the current proceedings may meet the active efforts requirement. Endorses futility exception.
- Evidence existed beyond a reasonable doubt that continued custody of the child with BM was likely to result in serious emotional or physical damage to the child. Applies anticipatory neglect argument.

Lee-Dissent

- Strong Dissent
- Active efforts requirement cannot be met by services provided three years ago. Federal law trumps.
- To meet beyond a reasonable doubt standard, need contemporaneous evidence of parental unfitness. Can't presume solely based on past conduct. Cites Stanley v. Illinois

Lee-Supreme Court

- Addresses two questions
 - Does the active efforts requirement mandate recent efforts to reunify or rehabilitate that particular family?
 - Does the beyond a reasonable doubt standard require contemporaneous evidence of unfitness?

Lee – Supreme Court

- Affirms judgment of COA b/c DHS provided timely, affirmative efforts that satisfied the ICWA's "active efforts" requirement.
- ICWA requires the DHS to undertake a thorough, contemporaneous assessment of the services provided to the parent in the past and the parent's response to those services before seeking to terminate parental rights w/o having offered additional services
 - Rejects futility test

Lee – Supreme Court

- ICWA, does not categorically require the DHS to provide services each time a new TPR proceeding is commenced.
- Reject claim that lower court applied a conclusive presumption of unfitness based on prior termination.
- Determination was supported by evidence beyond a reasonable doubt.

In re Mitchell – Supreme Court No. 139114, (entered on September 23, 2009)

- Peremptory reversal of TPR because trial court committed clear error (insufficient evidence) and plain error by failing to timely appoint counsel and failing to advise BF of consequences of his plea
- Adopts dissent written by Judge Stephens of COA (COA No. 286895) – strongly rejecting TPR for reasons of poverty
- Very similar to Hudson Morgan

Upcoming

- In re Hansen, Supreme Court No. 139507, leave granted on Nov. 4, 2009
- Issue is when can the rights of an incarcerated parent be terminated when relatives are willing to care for the child.

Published COA Opinions

- In re Michael Allen Jones Jr., COA 290194, (entered on Oct. 27, 2009) – a parent’s voluntary release of parental rights under the Adoption Code after the initiation of a child protective case doesn’t establish grounds for termination under MCL 712A.19b(3)(l). But termination was appropriate under MCL 712A.19b(3)(m).

Published COA Opinions

- In re Tommy Jay Rule Foster, COA 289345, (entered on August 4, 2009)
- Can consider advantages of foster home in best interest determination.
- “[W]hile it is inappropriate for a court to consider the advantages of a foster home in deciding whether a statutory ground for termination has been established, such considerations are appropriate in a best interests determination.”

Published COA Opinions

- In re Brandon Gavin Handorf, COA 290101, (entered on August 18, 2009)
- Guardians cannot consent to a child's adoption until parental rights have been terminated.
- "Until that termination takes place, consent to the adoption is irrelevant because the child is not free to be adopted."

Where to go to get updates

- Can sign up to receive opinions at the Court of Appeals' website:
 - <http://coa.courts.mi.gov/>
- If you're involved in a case with a good decision, request publication pursuant to MCR 7.215
- File applications for leave to appeal to the Michigan Supreme Court. We have a receptive bench.
- As a community we need to coordinate appellate litigation strategies. What issues should we look to challenge? In re CR