STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of XERIOUSE NACCIUS IGNELZI, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MARVEL TYLER, JR.,

Respondent-Appellant.

UNPUBLISHED
January 26, 2010

No. 292818
Van Buren Circuit Court
Family Division
LC No. 07-015994-NA

Before: Stephens, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

In this child protective proceeding, respondent Marvel Tyler, Jr., appeals as of right from a circuit court order terminating his parental rights to minor child XNI pursuant to MCL 712A.19b(3)(g). We reverse and remand.

On October 11, 2007, the Department of Human Services (DHS) submitted a petition seeking temporary custody of XNI and his half-sister, PNE. The petition referred to respondent as XNI's "putative" father and noted his address as a state prison in Indiana. The allegations in the petition concerned only XNI's mother, Amy Mason. In November 2007, the DHS filed a supplemental petition, which also set forth no allegations regarding respondent. On December 12, 2007, the circuit court determined that the children came within the court's jurisdiction. Genetic testing that took place in December 2007 established respondent's paternity of XNI.[1]

[1] Respondent's appellate counsel failed to order the transcripts of the hearings that occurred before September 2008, including the adjudication trial and at least three dispositional hearings. As a result, it is difficult to determine exactly what occurred in the course of these proceedings. We advise that appellate counsel should order transcripts of all hearings, including those conducted before a parent has been formally identified as a respondent. Review of all transcripts permits both appellate counsel and this Court a better opportunity to fully understand and appreciate the procedures employed by the circuit court and the evidence supporting or refuting the alleged grounds for termination.

On August 25, 2008, the circuit court appointed counsel for respondent, shortly before a September 19, 2008 permanency planning hearing. Neither respondent's counsel nor the circuit court referee expressed concern that respondent had not been offered an opportunity to participate in the hearing by telephone. Rachel Poole, a foster care worker, testified that respondent remained incarcerated in Indiana and that he had written the court a letter identifying his earliest release date as sometime in April 2010.[2] Poole admitted that she had never spoken with respondent and knew nothing about his preincarceration contacts with XNI.

In October 2008, the DHS filed a petition requesting termination of respondent's parental rights. With respect to respondent, the petition averred only the following:

> 2. The parents, without regard to intent, fail to provide proper care or custody for the children and there is no reasonable expectation that they will be able to provide proper care and custody within a reasonable time considering the age of the children. MCL 712A.19b(3)(g)
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> 3. There is a reasonable likelihood, based on the conduct or capacity of the parents, that the children will be harmed if returned to the home of the parents. MCL 712A.19b(3)(j)

On December 2, 2008, the circuit court commenced a termination hearing. Once again, none of the participants expressed concern regarding respondent's complete absence from the proceedings. When the hearing continued on March 25, 20097, respondent did not participate. Poole offered the following testimony about respondent:

> *Q.* Okay. As far as [respondent], when was the last time, or have you had any contact with him?
>
> *A.* I wrote him a letter. I do not remember the day, but I wrote him a letter letting him know that I received the letter he had sent to juvenile court, and that because he has not been involved because he has not provided care for his child, and will likely not be able to do so within a reasonable amount of time, that the agency will be pursuing termination of parental rights, and that when the court hearing was, and I also stated that if he would like me to submit any paperwork, any certificates or any type of programs that he had completed, that he should forward those to me so that I can do so. That was the basis [sic] content of the letter, and um, he did respond to that letter, frustrated, with our you know, stance. And just basically said that he cares for his child, and he wants to care for his child when he's released.
>
> *Q.* And he did, I believe, write [XNI] two letters and the court one letter, if I'm correct?

[2] None of the letters written by respondent appear in the record.

A. I believe he wrote [XNI] two letters and he has written, I believe, the court two letters. One letter initially and then one in response to mine. He wrote back to me and then cc'd that to the court with his own letter.

Q. Okay. And, to your knowledge, has [XNI] responded to the two letters that his dad wrote him?

A. He did respond to one. Something we found, I guess, was kind of telling in one of the letters was he identified his full name and he identified his age, things like that that most parents who are involved would know. So that was something [XNI] knew his dad wouldn't know, necessarily, about him, so that was interesting. But he responded to the one. The second letter he did not respond to. He just chose not to. He had been offered the opportunity on at least two occasions and he's chosen not to.

Poole's November 24, 2008 report, an exhibit received by the court during the termination hearing, supplied the following additional pertinent information:

Mr. Tyler was determined to be the legal father of [XNI] through genetic testing which occurred on 12/17/07. Mr. Tyler drafted a letter to the court, received on 8/20/2008, which was subsequently forwarded to this worker. Mr. Tyler acknowledges that he has been unavailable to care for his son due to incarceration. Apparently, Mr. Tyler was scheduled for release from the Indiana Department of Corrections on 4/30/2008; however, states he was immediately arrested again on an "old charge" and transported to the county jail where he currently resides. Mr. Tyler states, "I vehemently object to any type of adoption proceedings, pertaining to [XNI]. I look forward to, after my incarceration, to becoming the responsible, loving, and caring father my child needs. I refuse to continue to neglect his mental, emotional, and financial needs in his life, and I welcome the challenges of meeting the obligations of the court and society." Mr. Tyler states his new release date is "around April 30, 2010 or sooner with educational or substance abuse time-cuts." Although it appears Mr. Tyler has good intentions, Mr. Tyler has not provided for his son in any manner and clearly will not be able to provide care for [XNI] within a reasonable amount of time.

The circuit court terminated respondent's parental rights, finding:

[XNI] has now been in the court system for one and a half years and during the entire time his father, Marvel Tyler Jr. has been in prison. During the time that Mr. Tyler has been in prison he has written only two letters to [XNI] and there is no record of him sending any financial support. His earliest possible release date is over a year away.

* * *

Clear and convincing evidence has been presented that Marvel Tyler Jr., the father of [XNI], has consistently failed to provide care or custody for [XNI] and there is no reasonable expectation that he will be able to provide proper care

> and custody within a reasonable time considering the age of [XNI]. [MCL 712A.19b(3)(g).]
>
> Therefore the parental rights of Marvel Tyler Jr. to the minor [XNI] are hereby terminated.

Respondent's appellate brief asserts that he "was denied procedural and substative [sic] due process of law" by the circuit court's neglect to either secure his presence at the termination hearing or his participation by telephone. Respondent also maintains that the circuit court violated several provisions of the Michigan Court Rules, including MCR 2.004(A)(2), which, in relevant part, envisions an opportunity for incarcerated parties to termination of parental rights proceedings to have telephonic access to the proceedings, if the parties are "incarcerated under the jurisdiction of the Department of Corrections." Although we concur with the circuit court that the plain language of the court rule does not apply to respondent, who is incarcerated in a different jurisdiction, the important question for our consideration remains whether the circuit court violated respondent's due process rights by failing to meaningfully involve him in these child protective proceedings.

The importance of a parent's "essential" and "precious" right to raise his child is well-established in our jurisprudence. *Hunter v Hunter*, ___ Mich ___; ___ NW2d ___ (2009) (Docket No. 136310, decided July 31, 2009), slip op at 8-9. 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 9 (internal quotation omitted). As our Supreme Court acknowledged in *Hunter*, "where the parental interest is most in jeopardy, due process concerns are most heightened." *Id*. at 22.

In *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009) (opinion by Corrigan, J.), our Supreme Court described "the most basic requirements of procedural due process" by referencing the following excerpt from *Dow v Michigan*, 396 Mich 192, 205-206; 240 NW2d 450 (1976):

> The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v Ordean*, 234 US 385, 394; (34 S Ct 779; 58 L Ed 1363) (1914). The hearing must be at a meaningful time and in a meaningful manner. *Armstrong v Manzo*, 380 US 545, 552; (85 S Ct 1187; 14 L Ed 2d 62) (1965). *Goldberg v Kelly*, 397 US 254, 267; 90 S Ct 1011; 25 L Ed 2d 287 (1970). [Internal quotation omitted.]

"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." *Rood*, 483 Mich at 92 (internal quotation omitted). The Supreme Court in *Rood* reiterated that the three factors set forth in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976), supply proper guideposts for determining the process due in a particular case:

> "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."

These factors recognize that due process "is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334, quoting *Morrissey v Brewer*, 408 US 471, 481; 92 S Ct 2593; 33 L Ed 2d 484 (1972).

Here, application of the *Eldridge* factors compels our conclusion that the circuit court should have arranged for respondent to participate by telephone in the termination proceedings. First, the private interest of a parent in the care, custody and control of his children is one of the oldest fundamental liberty interests recognized by the United States Supreme Court. *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v Massachusetts*, 321 US 158, 166; 64 S Ct 438; 88 L Ed 645 (1944). In *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982), the United States Supreme Court emphasized that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." Thus, the first *Eldridge* factor weighs heavily in favor of respondent's right to participate telephonically in the proceedings.

The second *Eldridge* factor considers the degree to which the procedures afforded risk an erroneous deprivation of an interest. Here, entirely without respondent's participation in the proceedings, we regard as substantial the risk of an erroneous deprivation of his parental rights. The record reveals that the DHS workers lacked any reliable information about (1) the nature of respondent's relationship with XNI before his incarceration; (2) the length of time that respondent had been incarcerated; (3) the date of respondent's potential release; (4) whether respondent had attempted to plan for XNI or desired to share involvement in that process; (5) whether respondent had obtained any services in prison; or (6) whether respondent's family members were interested in caring for XNI, MCL 722.954a(2); 42 USC 671(a)(29). These critical evidentiary gaps gave rise to a substantial risk that respondent father would suffer an erroneous deprivation of his parental rights.[3]

The third *Eldridge* factor focuses on the state's interests. The cost and inconvenience of a telephone call imposes on the state a de minimus fiscal and administrative burden. Our research reflects that the Indiana Department of Corrections has experience permitting prisoners an opportunity to telephonically participate in child protective proceedings. See *In re ED*, 902 NE2d 316, 318 (Ind App, 2009). After balancing all the *Eldridge* factors, we conclude that fundamental due process notions obligated the circuit court to afford respondent the right to meaningfully participate in the termination hearing by telephone. Although not directly

[3] Furthermore, because petitioner sought to terminate respondent's parental rights based on a supplemental petition, it bore the burden of clearly and convincingly establishing his unfitness based on legally admissible evidence. *Rood*, 483 Mich at 101-102. Mason testified briefly about respondent's relationship with XNI, but her testimony was vague and uncertain concerning respondent's prior contacts with the child.

applicable here, MCR 2.004 manifests our Supreme Court's recognition that basic due process principles mandate affording incarcerated parents a meaningful opportunity to be heard before the state terminates their parental rights.

Furthermore, we cannot characterize respondent's absence as harmless error. Contrary to the circuit court's finding that "[c]lear and convincing evidence has been presented that [respondent] has consistently failed to provide care or custody for [XNI]," only Mason's uncertain speculation addressed respondent's preincarceration efforts to provide XNI care or custody. Additionally, the evidence failed to clearly and convincingly prove that "there is no reasonable likelihood that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." MCL 712A.19b(3)(g). In respondent's letter to the circuit court, he proposed that "time-cuts" might result in a release date sooner than April 2010. Given that (1) the supplemental petition was not filed until October 2008; (2) respondent twice contacted his son and forcefully advised petitioner of his interest in parenting; (3) petitioner entirely failed to perform any evaluation of respondent's parenting capability; and (4) a relatively short time remained on respondent's sentence, irrespective of any "time-cuts," insufficient evidence established that respondent could not parent XNI within a reasonable time.

That the circuit court refused to terminate Mason's parental rights reinforces our analysis. The evidence presented at the termination hearing indisputably demonstrated that Mason suffers from serious and longstanding psychiatric problems. Despite the circuit court's belief that, "left unsupervised, [Mason] is a danger to her children," the court declined to terminate her parental rights, explaining that "[c]lear and convincing evidence has not been presented that it is in the best interests of the children that the parental rights of Amy Mason should be terminated." Because XNI remains a temporary court ward, we direct that on remand the circuit court shall afford respondent a meaningful opportunity to participate in further hearings and a treatment plan, if available.

In summary, the circuit court's neglect to give respondent any meaningful opportunity to be heard during these proceedings, combined with petitioner's failure to perform even the most rudimentary investigation about respondent's background and capabilities, foreclosed the possibility of a decision predicated on clear and convincing evidence. Accordingly, we reverse the circuit court's order terminating respondent's parental rights.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Elizabeth L. Gleicher