

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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UNPUBLISHED  
November 18, 2010

In the Matter of K. PLOWMAN, Minor.

No. 297331  
Kent Circuit Court  
Family Division  
LC No. 08-054721-NA

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Before: STEPHENS, P.J., and MARKEY and WILDER, JJ.

PER CURIAM.

Respondent father appeals by right the order of the trial court terminating his parental rights to his minor child pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). We affirm.

In November 2008, respondent and the child's mother were involved in a serious fight in which respondent kicked the mother and hit her in the head while she was under the influence of alcohol and illegal drugs. The fight occurred in the home in the presence of the child and the mother's other children and grew so violent that the mother's 12-year-old daughter intervened to protect the mother, stabbing respondent with a knife. The children, including respondent's child, were thereafter removed from the home. Respondent was jailed briefly after the incident but released pending the outcome of charges arising from the incident.

Respondent and the child's mother had a history of domestic violence and of substance abuse. Petitioner offered services to respondent and the mother, including domestic violence counseling, substance abuse assessment and testing, psychological evaluation, and parenting classes. The record supports that respondent, however, generally declined to participate in services, claiming not to need the services and rejecting the services as irrelevant because he might be facing incarceration. Respondent also denied responsibility for the domestic violence and denied a substance abuse problem, refusing further testing after some tests indicated positive for drug use.

After six months, respondent was incarcerated in a county jail to serve a sentence related to a conviction for the November 2008 domestic assault. While respondent was incarcerated, the child protective proceedings involving the child continued, and though respondent's counsel was present during the proceedings, respondent did not attend three of these hearings due to his incarceration. In February 2010, one month before respondent was to be released from jail, the trial court held a termination hearing regarding his parental rights to the child. Respondent was present at the hearing and represented by counsel. At the conclusion of the hearing, the trial

court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(c)(i), (g), and (j), and also terminated the parental rights of the child's mother.

On appeal, respondent contends that he was entitled to attend the hearings that were held while he was incarcerated in a county jail, and that failure to ensure his access to these hearings violated his right to procedural due process. Our Supreme Court in its recent decision of *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), addressed the issue of whether an incarcerated parent had the right to participate in child protective proceeding hearings during his incarceration. In *Mason*, the respondent father was incarcerated at the time that his children were removed from the care of their mother. Several hearings were held while the respondent was incarcerated and he did not attend either in person or by telephone. The respondent attended the termination hearing and testified at that hearing, although still incarcerated. The trial court thereafter terminated the respondent's parental rights.

In *Mason*, our Supreme Court stated that MCR 2.004 requires the trial court and the petitioner to arrange for a parent incarcerated in a Department of Corrections (DOC) facility to participate by telephone in hearings for child protective proceedings; it rejected the argument that the respondent's participation in only some hearings fulfilled this requirement. *Mason*, 486 Mich at 154. But MCR 2.004, relied on by the *Mason* Court, applies only to persons incarcerated under the jurisdiction of the DOC, not sentenced to incarceration in a county jail. Further, the *Mason* Court's decision to vacate the trial court's termination order in that case was not based on a denial of constitutional due process. See *Mason*, 486 Mich at 154: "We do not reach the question whether reversal could be independently required under a due process analysis." Here, respondent attended the adjudication and disposition hearing, some review hearings, and the termination hearing. Although he did not attend some review hearings while incarcerated, he also missed at least one review hearing while not incarcerated. In addition, respondent was represented by counsel at all hearings and counsel made no effort to procure respondent's presence or request that respondent be permitted to participate by telephone in hearings that he did not attend. Respondent was accorded procedural due process because he was given notice of the proceedings and had the opportunity to meaningfully participate in them. See *In re Rood*, 483 Mich 73, 118-119 (CORRIGAN, J.); 124 (CAVANAGH, J.); 763 NW2d 587 (2009); *Mason*, 486 Mich at 176-177 (MARKMAN, J., *dissenting*). Moreover, in *Mason*, our Supreme Court did not automatically reverse the trial court's order of termination simply because the respondent had not been present at certain hearings. Rather, the majority in *Mason* found reversal warranted because the trial court based its decision to terminate the respondent's parental rights solely upon the fact of his incarceration, *Mason*, 486 Mich at 160, 167, and because the DHS violated its statutory responsibilities to provide the respondent with a meaningful opportunity to comply with a case service plan, *id.* at 156, 169. Additionally, the state failed to afford respondent the opportunity under MCR 2.004 to participate in the proceedings, *Mason*, 486 Mich at 152-155, and the trial court's decision was "replete with clear factual errors and errors of law that essentially resulted in the termination of respondent's parental rights solely because of his incarceration." *Id.* at 160.

Unlike *Mason*, a review of the record in this case demonstrates that ample evidence existed to support the trial court's finding that termination of respondent's parental rights was warranted pursuant to MCL 712A.19b(3)(c)(i), (g), and (j), and further demonstrates that the trial court did not inappropriately base its decision to terminate solely on respondent's incarceration.

Reversal is not warranted. In this case, the trial court found under subsection (3)(c)(i) that the conditions that led to adjudication continued to exist and that there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the child's age. The record supports this determination. During the approximately six months after the child was removed but before respondent was incarcerated, respondent was offered services by petitioner, including domestic violence counseling, which respondent declined, explaining alternatively that he was not to blame for the violence, that he was too upset by the injustice of the accusations to engage in counseling at that time, and that he felt there was no point in engaging in services because he might be incarcerated soon. Petitioner also offered respondent substance abuse assessment, as well as psychological testing, which again, respondent declined, asserting that he did not have a substance abuse problem, though he later testified that he had been using alcohol and illegal drugs consistently for the past 16 years. Respondent participated in some of the offered drug tests, but declined further drug testing after producing some positive tests. After incarceration on June 3, 2009, respondent became interested in receiving services. According to respondent's testimony, he began attending church services regularly in jail, as well as weekly Narcotics Anonymous meetings. He also completed an offered behavioral therapy course while in jail. He corresponded with the foster care worker, and refrained from misconduct while incarcerated.

In arriving at its decision, the trial court in this case, unlike *Mason*, did not focus upon respondent's incarceration or lack of progress while incarcerated. The trial court acknowledged that respondent in fact had made efforts during incarceration, including work on behavior modification. The trial court, however, placed greater emphasis on the testimony of foster care workers and the expert witness that no child would be safe in respondent's care given his propensity toward violence. Further, respondent in this case presented no plan for the care of his child. Respondent's only plan for the child was to ask the child to wait for respondent to complete his jail sentence and then wait longer while respondent began to work on establishing a stable lifestyle and home. Respondent could not be troubled to begin work on these issues in the six months preceding his incarceration, nor had he arranged a plan for the child during his anticipated incarceration. Unlike *Mason*, this case was not determined based upon incarceration but upon lack of initiative and threat of extreme danger to the child. For the same reasons, the record also supports the trial court's determination that termination was warranted under subsections (3)(g) and (3)(j).

We further reject respondent's unpreserved contention that he was denied due process because his parental rights were terminated one month before his release and because the trial court did not terminate the mother's parental rights until respondent's termination proceedings were completed. We detect no plain error affecting substantial rights in the actions of the trial court noted by respondent. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

We affirm.

/s/ Cynthia Diane Stephens  
/s/ Jane E. Markey  
/s/ Kurtis T. Wilder