# STATE OF MICHIGAN

# COURT OF APPEALS

*In re* A. A. GOGINS, Minor.

UNPUBLISHED
October 22, 2015

No. 326384
Mecosta Circuit Court
Family Division
LC No. 11-005776-NA

Before: M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating his parental rights to his son, AG, pursuant to MCL 712A.19b(3)(a)(*ii*) (desertion for 91 or more days) and MCL 712A.19b(3)(c)(*i*) (failure to rectify conditions leading to adjudication). Respondent raises two issues on appeal. First, he argues that because the child protective proceedings were initiated in 2011 and he was not appointed counsel until June of 2014, he was denied his constitutional right to counsel and due process. Second, he argues petitioner failed to provide reasonable reunification efforts. For the reasons stated in this opinion, we affirm.

## I. PROCEDURAL AND FACTUAL BACKGROUND

On October 30, 2014, petitioner filed a petition seeking jurisdiction over AG and two of his half-siblings.[1] Notably, the petition did not include any allegations against respondent. AG's mother pleaded to jurisdiction on November 22, 2011. At that time, a caseworker for the Department of Health and Human Services (the Department) testified that respondent was provided with a copy of the petition and that he had spoken with respondent over the phone. The caseworker expressly testified that although there was no case open against respondent, respondent would receive parenting time and, if a need for services was identified, respondent would be provided with services.

Between November of 2011 and February of 2013, AG remained in his mother's home. Respondent did not attend any of the court proceedings; however, review of the lower court record shows that there are multiple proofs of service indicating that he was mailed notice of the proceedings.

[1] The other children named in the October 26, 2011 petition were not respondent's children.

On February 27, 2013, petitioner filed a supplemental petition seeking removal of the children, including AG, from the mother's home and requesting termination of her parental rights. The children were removed from the mother's home and placed with a maternal aunt.[2] The supplemental petition still contained no allegations against respondent.

On March 15, 2013, respondent was visited at the Lake County Jail by a caseworker for the Department. It is undisputed that respondent was informed about the proceedings at that time. However, respondent testified that before March of 2013, he was unaware of the Department's attempts to locate him.

On March 29, 2013, petitioner filed a supplemental petition seeking jurisdiction over AG. For the first time, the petition included allegations against respondent, but it did not seek termination of his parental rights. A caseworker for Holy Cross Children's Services[3] testified that respondent's initial case services plan began in March of 2013. The record shows that respondent received services for anger management and substance abuse. It also shows that he was provided with supervised parenting time. However, respondent admitted that he stopped attending classes for anger management and substance abuse and that he stopped participating in parenting time. The testimony established that, even though parenting time was still being offered, respondent's last visit with AG occurred on July 8, 2013.

The testimony established that the caseworkers made numerous attempts to contact respondent, including attempts at calling him on his and his girlfriend's phones and sending him letters. In particular, one caseworker sent respondent a letter in September of 2013 indicating that his lack of participation could result in a change in the permanency goal. Further, the caseworker testified that on another occasion, when she successfully reached respondent via phone, she informed him that it was important to maintain his relationship with AG. She testified that during the call, respondent agreed to attend visitation with AG in a therapeutic setting per AG's therapist's recommendation. However, after she called AG's therapist to arrange the visitation, she was unable to reestablish contact with respondent even though she called back only fifteen minutes later.

On April 15, 2014, AG's mother voluntarily relinquished her parental rights to AG.

About a month later, on May 19, 2014, petitioner filed a petition seeking termination of respondent's parental rights. The petition alleged that the Department and Holy Cross had been unable to locate respondent and that he had no contact with either the Department or AG in more than 91 days. The petition further alleged that respondent lacked stable housing, had mental health issues, was unemployed, had refused counseling services, had "sporadic" attendance at the mandatory court proceedings, and had not shown sufficient benefit from the services provided.

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[2] AG was eventually removed from the maternal aunt's home and placed in a licensed foster home.

[3] The record shows that Holy Cross took over case management for the Department as of June 11, 2013.

On June 10, 2014, the trial court appointed respondent with counsel. More than four months later, on October 30, 2014, an adjudication trial was held and the jury concluded that statutory grounds existed to establish jurisdiction and the court entered an order to that affect.

Finally, on March 3, 2015, the termination hearing was held. Following the presentation of proofs, the trial court found by clear and convincing evidence that petitioner had established grounds to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(a)(*ii*) and (c)(*i*). The court also found that termination of respondent's parental rights was in AG's best interests. This appeal follows.

## II. RIGHT TO COUNSEL

Respondent first argues that he was deprived of his constitutional right to counsel and to due process of law because, although the initial petition was filed in October of 2011, he was not appointed counsel until June of 2014.[4] We disagree.

"[T]he United States Constitution guarantees a right to counsel in parental rights termination cases." *In re Williams*, 286 Mich App 253, 275; 779 NW2d 286 (2009); US Const, Am VI. Further, "the constitutional right of due process confers on indigent parents the right to appointed counsel at hearings that may involve the termination of their parental rights." *Id*. at 275-276, citing *In re Cobb*, 130 Mich App 598, 600; 344 NW2d 12 (1983). In *Williams*, this Court recognized that MCL 712A.17c(4) and MCR 3.915(B)(1)(b) "specifically extend the right of appointed counsel only to indigent 'respondent[s]' in child protective proceedings." *Williams*, 286 Mich App at 276 (alteration in original). Accordingly, we held that because the "initial petition contained no allegations of wrongdoing against [the] father, and expressed no concerns about his ability to parent," the father "did not qualify as a 'respondent' " during the preliminary hearing, the adjudication, and the dispositional hearing. *Id*. at 276. Instead, it was only when the circuit court authorized a supplemental petition containing allegations against the father that the trial court was required to advise the father of his right to appointed counsel. *Id*.

Respondent argues he qualified as a "respondent" in 2011 because MCR 3.977(B)(2) states that "respondent" includes "the father of the child as defined by MCR 3.903(A)(7)." He argues that he meets the definition of father in MCR 3.903(A)(7)(c), which provides that "father" means "[a] man who by order of filiation or by judgment of paternity is judicially determined to be the father of the minor[.]" However, in *Williams*, we noted that MCR 3.903(C)(10) defines the term "respondent" as "the parent, guardian, legal custodian, or nonparent adult who is alleged to have committed an offense against a child." *Williams*, 286 Mich App at 276 n 6, quoting MCR 3.903(C)(10). And the term "offense against a child" is defined by court rule as "an act or omission by a parent, guardian, nonparent adult, or legal custodian asserted as grounds for bringing the child within the jurisdiction of the court pursuant to the Juvenile Code." *Id*.,

[4] "Whether a child protective proceeding complied with a respondent's right to due process presents a question of constitutional law that we review de novo." *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009).

quoting MCR 3.903(C)(7). Moreover, the court rule that respondent is relying on, MCR 3.977(B)(2), addresses *termination* proceedings and MCR 3.977(A)(1) expressly limits its application to "all proceedings in which *termination* of parental rights is sought." (emphasis added). In this case, it is undisputed that respondent was represented by counsel at the *termination* hearing. Based on the definition of 'respondent' in *Williams*, we reject respondent's interpretation of MCR 3.903(A)(7)(c) and MCR 3.977(B)(2), which attempts to apply those court rules to the proceedings prior to the termination proceeding. Applying the definition of 'respondent' from *Williams*, respondent was not entitled to counsel until March 29, 2013 because there were no allegations of wrongdoing or expressed concerns about respondent's ability to parent AG between October 26, 2011, when the initial petition was filed against the mother, and the March 29, 2013 supplemental petition containing allegations against respondent.

Having determined that respondent's right to counsel was not violated between October 26, 2011 and March 29, 2013, we must determine if respondent's right to counsel was nevertheless violated by the proceedings following the March 29, 2013 petition that qualified respondent as a "respondent" under *Williams.*

Pursuant to the court rules, the right to counsel is initially implicated by a respondent's first court appearance, MCR 3.915(B)(1)(a), and the appointment of an attorney applies where the respondent requests an attorney and is indigent, MCR 3.915(B)(1)(b). Although respondent argues that he was not provided with information on the case, the record supports that he was actually aware of the proceedings as early as November 22, 2011. Indeed, respondent's testimony established that, at the very latest, respondent was informed of the proceedings on March 15, 2013, which was before the March 29, 2013 petition that qualified him as a respondent pursuant to *Williams*. In spite of that knowledge, respondent failed to appear at any court hearing before his adjudication trial.[5] Given that respondent failed to appear at any court proceedings, we conclude that there is no violation of his right to counsel pursuant to MCR 3.915, which expressly applies at a respondent's first court proceeding when a respondent requests the appointment of counsel. See *In re Hall*, 188 Mich App 217, 222; 469 NW2d 56 (1991) (holding that a respondent must take some minimal affirmative action in order to have an attorney appointed at a statutory review hearing).

Moreover, "[t]he Fourteenth Amendment does not require court-appointed counsel for a respondent in every neglect or parental rights termination proceeding." *In re Perry*, 148 Mich App 601, 615; 385 NW2d 287 (1986). "[B]efore the right to appointed counsel arises in cases

[5] We expressly note that this is not a case where respondent lacked notice of the court proceedings before adjudication. Instead, the record shows that he participated in services, including parenting time and anger management and substance abuse classes. Then, in spite of his admitted knowledge about the proceedings, respondent decided to discontinue his involvement with the case. He stopped participating in the substance abuse and anger management classes, failed to attend parenting time, and failed to return calls from the caseworkers attempting to contact him. Accordingly, we do not address the potential situation where a respondent is wholly unaware of the proceedings and allegations against him.

such as this, there must be a petition seeking the *permanent* custody of a child or an indication by the probate court that the termination of parental rights—if such an alternative was not previously considered—has become a possibility." *In re Nash*, 165 Mich App 450, 458; 419 NW2d 1 (1988). Applying that principle, the *Nash* Court held that there was "no due process right to the assistance of court-appointed counsel" at an adjudicative hearing where the only matter at issue was whether the allegations in the petition for jurisdiction were substantiated. *Id*. at 458-459.

The goal under the March 29, 2013 petition was reunification and a case services plan was developed in March of 2013. For approximately three months following the filing of the petition respondent participated in some services and parenting time. Moreover, it is clear from the record that the shift from reunification to termination was prompted by respondent's decision to cease participation after his last parenting time visit on July 8, 2013. As a consequence of respondent's own actions, his visitation was suspended because of concerns for the child's emotional wellbeing caused by respondent's repeated failures to appear. Moreover, respondent's lack of participation and communication with his caseworkers ultimately caused petitioner to seek termination in the May 19, 2014 supplemental petition. After the termination petition was filed, the trial court appointed respondent counsel and respondent was represented at both the adjudication trial and the termination hearing. Respondent's right to counsel under the court rule was not triggered until petitioner sought *permanent* custody in May 2014, at which point, he *was* appointed representation, providing an additional reason why the right to counsel was not violated under MCR 3.915. See *In re Williams*, 286 Mich App at 278 n 8; *In re Nash*, 165 Mich App at 458.

## III. REUNIFICATION EFFORTS

Next, respondent argues that, like the father in *In re Rood*, 483 Mich 73; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.), he was not provided with reasonable reunification efforts. We disagree.

"Generally, when a child is removed from the parents' custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re HRC*, 286 Mich App 444, 462; 781 NW2d 105 (2009). "Reasonable efforts to reunify the child and family must be made in *all* cases except those involving aggravated circumstances . . . ." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (citation omitted) (emphasis in original). Thus, "a court may not terminate parental rights on the basis of 'circumstances and missing information directly attributable to respondent's lack of meaningful prior participation.' " *Id*. at 159-160, quoting *In re Rood*, 483 Mich at 119. If a respondent is unable to participate there is a "hole" in the evidence supporting a termination decision. *Mason*, 486 Mich at 160. However, although the Department "has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

In this case, the caseworkers testified about the efforts they made to contact respondent. These contacts included visits and attempted visits with respondent while he was incarcerated, phone calls to both respondent and respondent's girlfriend, and letters sent to respondent's

address. Notably, one caseworker testified that on one occasion when she successfully contacted respondent she informed respondent that it was important for him to maintain a relationship with AG. She explained that AG's therapist was recommending parenting time in a therapeutic setting, which respondent agreed to participate in. However, even though the caseworker called the therapist to set the parenting time up, she was unable to reestablish contact with respondent a mere fifteen minutes later. For his part, respondent testified that he was informed about the proceedings while he was incarcerated and stated that he was not sure why he did not return the caseworkers' phone calls. Accordingly, the caseworkers in this case, unlike the caseworkers in *Rood*, were actively attempting to contact respondent. See *In re Rood*, 483 Mich at 115.

Moreover, another caseworker testified that respondent's case services plan began in March of 2013, which is the same month that the petition against him was filed. The record shows that respondent was provided with substance abuse and anger management classes, but that the service provider closed his case because respondent failed to attend the classes. Further, respondent was provided with parenting time, which he initially attended. During the parenting time, the caseworkers observed a bond between respondent and AG. However, respondent decided to stop participating in parenting time in July of 2013. At the termination hearing, he assigned blame for his failure to attend to his dissatisfaction with the level of supervision Holy Cross was providing and because he was experiencing depression. Respondent opted not to participate in the proffered services and for reasons he is unsure of, decided not to return his caseworkers' phone calls. Accordingly, on this record, respondent's argument that he was not provided with reasonable reunification efforts is without merit.

Affirmed.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro