

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
April 16, 2013

In the Matter of JOHNSON, Minors.

No. 311862
Oakland Circuit Court
Family Division
LC No. 09-764639-NA

Before: WILDER, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating his parental rights to his minor children under MCL 712A.19b(3)(c)(i), (g), and (j). For the reasons set forth below, we reverse and remand for further proceedings consistent with this opinion.

I. RESPONDENT'S RIGHT TO PARTICIPATE IN PROCEEDINGS

On appeal, respondent does not challenge the statutory grounds upon which his parental rights were terminated. Instead, he first seeks reversal of the trial court's order on the ground that petitioner failed to comply with MCR 2.004 because respondent was not properly included in proceedings. We agree with respondent.

MCR 2.004 requires the petitioner to request that a respondent who is incarcerated under the jurisdiction of the Department of Corrections be allowed to participate in the proceedings by telephone. Because a child protective action consists of a series of proceedings, each involving different issues and decisions by the court, to comply with MCR 2.004, the petitioner and the trial court must offer the parent an opportunity to participate in *each* proceeding. *In re Mason*, 486 Mich 142, 154; 782 NW2d 747 (2010). In this case, arrangements were not made for respondent to be included in each of the proceedings.

At the review hearing on March 2, 2010, the caseworker informed the trial court that respondent was in the Oaks Correctional Facility. Respondent was not made aware of the hearing beforehand, and he never received the order following the hearing because it was sent to the Oakland County Jail after he had been moved to the Oaks Correctional Facility. There is no evidence that respondent was notified of the dispositional review hearing on June 4, 2010, and no arrangements were made for him to be included in the hearing telephonically. The record only contains proof of service that an order dated June 8, 2010 was sent to respondent at an address in Waterford by ordinary mail. Two subsequent dispositional review hearings were held on July 8, 2010 and August 24, 2010, and again, there was no mention of respondent at either of

these hearings, and there was no evidence that he was offered an opportunity to participate in the hearings. On September 16, 2010, at the dispositional review hearing, the trial court told the caseworker to inform respondent of the proceedings and to arrange a telephonic communication. The court's disposition sheet following the hearing shows that the trial court was aware they were sending orders for respondent to the wrong address.

Six months after the caseworker first informed the trial court that respondent was incarcerated at the Oaks Correctional Facility, respondent was served with an order requesting his participation in the October 29, 2010 permanency planning hearing. MCR 2.004(C) requires that the order be served on the warden or supervisor of the facility where the incarcerated party resides. But in this case the order was faxed to the prison warden, and the hearing was held without respondent; accordingly, respondent was not given an opportunity to participate in that hearing.

At the dispositional review hearing on January 24, 2011, respondent was not present, and there is no evidence that he was notified of the proceedings or that arrangements were made to include him by telephone. It was not until February 8, 2011, that a request for respondent's participation for the April 1, 2011 hearing was successful. During respondent's first telephonic appearance on April 1, 2011, he asked the trial court why he had not been included in prior court proceedings. In response, the trial court assured him that he was now "on board" and would be included in future proceedings involving his children.

Nevertheless, at the dispositional review hearing on July 7, 2011 and the emergency removal hearing on August 29, 2011, respondent was neither present, nor mentioned, and there is no evidence of efforts made to include him. He was also not present for the permanency planning hearing on October 2, 2011, and he was not offered an opportunity to participate in the proceedings. Subsequently, the October 26, 2011 notice of hearing did not include respondent. It was not until February 22, 2012, that a summons and petition were served on respondent for the termination hearing.

As this Court explained in *In re DMK*, 289 Mich App 246, 254-255; 796 NW2d 129 (2010), the initial hearings in child protective proceedings allow parties to familiarize themselves with parents' abilities and concerns, the children's needs, and efforts necessary for reunification. Had respondent participated in any of these earlier hearings, he could have supplied the court with relevant information and the nature of the services necessary to achieve a permanency goal in the children's best interests. Instead, in this case, as in *Mason*, 486 Mich at 154, by the time the trial court recognized respondent's right to participate in these child protective proceedings, the trial court and petitioner were preparing to move on to the termination hearing. As in *Mason*, respondent "missed the crucial year-long review period during which the court was called upon to evaluate the parents' efforts and decide whether reunification of the children with their parents could be achieved." *Id.* Respondent "endured prejudice because he remained absent during a critical time in these child welfare proceedings." *DMK*, 289 Mich App at 254.

Moreover, in *Mason*, the Court clarified that an incarcerated parent must be afforded the right to participate in *each* proceeding in a child protective action, pursuant to MCR 2.004, and that he must be offered a service plan with appropriate review and updates. *Mason*, 486 Mich at 154. The record shows that respondent was not present in person or by telephone for most of the

hearings and was not offered the opportunity to participate. The *Mason* Court made it clear that participation in some hearings is not sufficient to satisfy the requirements of MCR 2.004. *Mason* 486 Mich at 154-155. In this case, as in *Mason*, petitioner's disregard for respondent extended the time it would take him to comply with the service plan upon his release from prison. *Id.* at 159. Reversal is warranted because the trial court based its decision to terminate parental rights solely on respondent's incarceration. *Id.* at 160, 167.

II. RESPONDENT'S RIGHT TO COUNSEL

Respondent next argues that the trial court violated his due process rights in failing to inform him of his right to counsel. We agree.

A respondent in child protective proceedings has a due process right to counsel. MCL 712A.17c(5); MCR 3.915(B)(1). At a respondent's first court appearance, the court must advise him of the right to retain counsel to represent him at any hearing and that he has the right to court-appointed counsel if he is financially unable to retain counsel. MCL 712A.17c(4); MCR 3.915(B)(1)(a). The court must appoint an attorney for the respondent if he requests appointment of counsel and shows, through written financial records or otherwise, that he is financially unable to retain an attorney. MCL 712A.17c(5); MCR 3.915(B)(1)(b).

Respondent first appeared at a hearing via speaker telephone on April 1, 2011. At no time during that hearing was respondent offered assistance of counsel. Moreover, the record shows that respondent requested an attorney on February 6, 2012. However, there is no evidence that he was ever previously informed of his right to counsel. Accordingly, the trial court erred, as it was required to inform respondent of his right to counsel. MCL 712A.17c(4); MCR 3.915(B)(1)(a).

Although respondent was represented by counsel at the termination hearing in this case, due process is a flexible concept that requires fundamental fairness, *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), and in this case respondent was not treated fairly. As a non-lawyer, respondent may not have been aware that he had the right to legal representation at the proceedings, and he could not be expected to know how to take the proper steps to preserve an issue for appellate review, or even that issues need to be preserved for appellate review at all. Moreover, because respondent was not properly notified of the proceedings or included in them, he could not have been reasonably expected to appear, or assert his rights earlier so an attorney could have been appointed. Given that respondent inquired why he was not included in prior proceedings on April 1, 2011, requested counsel on February 6, 2012, and requested appellate counsel after his parental rights were terminated, it is likely that he would have exercised his right to an attorney earlier in the trial court's proceedings and would have been financially unable to retain an attorney.

Respondent had a constitutional right to the assistance of counsel at the hearings involving his custodial rights to his children and was not advised of this right. Moreover, there is no indication that respondent knowingly waived his right to counsel. MCL 712A.17c(6); MCR 3.915(B)(1)(c).

III. REASONABLE EFFORTS TO SERVICE THE CASE

Finally, respondent argues that petitioner failed to make reasonable efforts to service the case. Again, we agree.

When a child is removed from a parent's custody, petitioner "is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005) (citations omitted). In general, the reasonableness of the services offered to a respondent may affect the sufficiency of the evidence offered to establish a statutory ground for termination. *Id.* at 541.

"Reasonable efforts to reunify the child and family must be made in *all* cases' except those involving aggravated circumstances not present in this case. MCL 712A.19a(2)." *Mason*, 486 Mich at 152 (emphasis in original). "Before the court enters an order of disposition in a proceeding under section 2(b) of this chapter, the agency shall prepare a case service plan," which "shall include" a "[s]chedule of services to be provided to the parent, [and] child . . . to facilitate the child's return to his or her home or to facilitate the child's permanent placement." MCL 712A.18f(2), and (3)(d). And generally, the court must hold review hearings where it "shall review on the record . . . [t]he extent to which the parent complied with each provision of the case service plan, prior court orders, and an agreement between the parent and the agency." MCL 712A.19(6)(c).

The record shows that the caseworker made very little effort toward respondent. At the permanency planning hearing on October 29, 2010, the caseworker said she had been in contact with respondent's case manager at the prison and sent him a release of information. Subsequently, at the dispositional review hearing on January 24, 2011, the caseworker said she had "some contact" with respondent. There is no detail provided about this contact or what efforts the caseworker made to facilitate respondent's participation in a treatment plan. In fact, on April 1, 2011 at the dispositional review hearing, the trial court informed respondent that he would be expected to participate in a treatment plan and respondent asked why he was not involved in prior proceedings. Respondent's inquiry makes it clear that little effort, if any, had been made toward him. Moreover, this lack of effort continued because at the permanency planning hearing on December 2, 2011 the caseworker stated that she communicated with respondent via letter but no details were provided about the content of that letter and there is no evidence of the efforts she made. Additionally, at the termination hearing on April 6, 2012, respondent stated that he had not been given a treatment plan. The trial court terminated respondent's parental rights, in part, because he was unable to provide a custodial plan to keep his children out of foster care even though there is no evidence that he was given the opportunity to plan for them.

The record shows that the caseworker blamed respondent's prison caseworker for not getting back to her, but there is no evidence of what efforts the caseworker made to follow up even though it was her duty to make reasonable efforts to facilitate treatment before termination of parental rights. Moreover, the trial court terminated respondent's parental rights largely based on his incarceration. Termination of respondent's parental rights was based on his inability to take advantage of services or provide care for the children due to his incarceration. It was not until the best-interest hearing that the caseworker acknowledged that the prison offered parenting classes, therapy, anger management, domestic violence, and GED classes. Although respondent completed phase one substance abuse treatment, a positive thinking class, and anger management

while in prison, the caseworker seemed to have overlooked him, insisting that he was unable to plan for his children while incarcerated.

The facts in this case resemble those in *Mason*. As in *Mason*, the respondent's access to services was not facilitated by the courts or the petitioner. Petitioner focused its reunification efforts on the children's mother and disregarded respondent's statutory rights to be provided services. As a result, this extended the time it would take respondent to comply with a case service plan upon his release from prison. The state failed to involve respondent, but then terminated his rights, in part because of his failure to comply with the service plan, while giving him no opportunity to comply in the future. This constituted clear error. 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." *In re Rood*, 483 Mich 73, 119; 763 NW2d 587 (2009). As noted in *Mason*, "a criminal history alone does not justify termination." *Mason*, 486 Mich at 165. Thus, because petitioner did not make reasonable efforts to service the case, termination of parental rights was clearly erroneous.

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

/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause