STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MCCULLOUGH, Minors.

UNPUBLISHED
September 23, 2014

No. 318737
Calhoun Circuit Court
Family Division
LC No. 2013-002173-NA

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

Respondent-father appeals as of right the order terminating his parental rights to the minor children NM and RM under MCL 712A.19b(3)(g) (failure to provide proper care and custody). We reverse and remand.

I. BACKGROUND

NM and RM are twins born May 7, 2013. Both children tested positive for marijuana at birth. RM also tested positive for hydrocodone. Respondent-father was incarcerated in Kentucky at the time of their birth due to being charged with possession of cocaine. Children's Protective Services (CPS) filed a petition on May 17, 2013, to remove the twins from their mother, who is not a party to this appeal, and terminate her parental rights based on MCL 712A.19b(3)(i)[1], the mother and children testing positive for drugs, and the mother admitting that she lacked housing, any baby items and the ability to provide for the children's basic needs. The petition noted respondent-father's incarceration, alleged he was a fugitive from Michigan and that his incarceration made him unable to care for the children. The court found probable cause and authorized the petition. The children were placed with their paternal great grandmother in June 2013 and then with their paternal grandparents at the end of June, beginning of July 2013.

An amended petition was filed on August 20, 2013, and requested the trial court assume jurisdiction over the children and terminate the parental rights of both parents. On September 27, 2013, respondent-father was sentenced to three years' imprisonment in Kentucky with credit

[1] Termination pursuant to MCL 712A.19b(3)(i) is proper where "[p]arental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful."

for time served. On October 3, 2013, the trial court held an adjudication trial and a termination hearing. Before the proceeding began, respondent-father's attorney noted that respondent-father was not present in the courtroom because he was incarcerated in Kentucky. Respondent-father's attorney reported that respondent-father wished to participate in the proceeding by telephone. According to his attorney, respondent-father had "some information regarding the length of his incarceration" that he believed was "germane to the[] proceedings." Respondent-father's attorney reported that he spoke to "the Captain" at the Kentucky jail in which respondent-father was lodged; "the Captain" informed him that, because the jail only had two telephone lines, respondent-father would only be permitted to participate by telephone for 15 minutes. Respondent-father's attorney requested that respondent-father be permitted to participate in the proceeding by telephone.

The trial court found that MCR 2.004[2] did not "entitle" respondent-father to participate in the proceedings by telephone because he was not incarcerated under the jurisdiction of the Michigan Department of Corrections and that respondent-father would not be deprived his procedural due process rights when he had been represented by counsel throughout the proceedings. The trial court further found that respondent-father would be able to respond to the allegations through his counsel given the fact that father had been "informed of the nature . . . of the proceedings against him" and the fact that father had been in contact with his attorney. The trial court denied respondent-father's motion to participate in the proceeding by telephone.

The prosecution presented two witnesses, children's foster care worker Lauren Zima, and CPS investigator, Michelle Coplin. Coplin's testimony in support of terminating respondent-father's parental rights was that he was

> incarcerated for a lengthy amount of time and that time – there's not a short amount of time that he's gonna be able to regain custody of his children. He did not arrange for care and custody prior to their birth, they didn't have a plan before hand. So in – in that way, I believe that he has failed to provide care and custody for his child.

Coplin admitted she had no first-hand or direct knowledge of respondent-father's length of incarceration. She also testified that she had never had any contact with respondent-father. Zima testified

> It was my understanding through my conversation with the Prosecutor's Office and my conversation with the jail who had just met with the parole people – I'm not sure exactly what they're called, that he was sentenced to three years on Friday with time served. Addition – additionally to that, he does have a fugitive status from Michigan, so it's my understanding that once he is released from

[2] "MCR 2.004 requires the court and the petitioning party to arrange for telephonic communication with incarcerated parents whose children are the subject of child protective actions." *In re Mason*, 486 Mich 142, 152-153; 782 NW2d 747 (2010).

> Kentucky that Michigan Department of Corrections will be transporting him back to Michigan for sentencing here in approximately two and a half years.

Zima testified that she had spoken with respondent-father on the phone a few times and had communicated with him through letters. She stated that while respondent-father was "more than willing" to participate in any services required by the Department of Human Services (DHS), there were none available to him in Kentucky. Zima testified that she confirmed the lack of services with the "jail warden".

The prosecutor argued in closing that termination of respondent-father's parental rights was proper under MCL 712A.19b(3)(a)(ii) (parent deserted child for 91 or more days), (g) (proper care and custody), (h) (parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years), and (j) (reasonable likelihood child will be harmed if returned to parent). The trial court asked the prosecutor if he wished to amend the termination petition to add additional statutory grounds for termination. Respondent-father's attorney had no opportunity to consult with his client and objected and argued that adding additional grounds for termination violated respondent-father's right to due process. The trial court allowed the prosecutor to amend the petition over the objection after finding that, based on the circumstances of the case and the record evidence it should not have been a "surprise" to respondent-father that additional grounds for termination were being alleged.

The trial court announced its ruling on the record. The court first stated that jurisdiction was proper under MCL 712A.2(b)(2)[3]. Next, the court found that respondent-father had been incarcerated in Kentucky since April 26, 2013, had been charged with possession of cocaine, was a fugitive from Michigan, and was "unavailable to care for the children." Based on its findings, the trial court determined that respondent-father's incarceration made him unavailable for the care of his two children and that respondent-father's history put the children at a reasonable risk of harm should they be placed with him in the future. The court ordered respondent-father's parental rights terminated under MCL 712A.19b(3)(g).

II. STATUTORY GROUNDS FOR TERMINATION

In order to terminate parental rights, the "trial court must find by clear and convincing evidence that one or more grounds for termination exist. . . ." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). We review "the trial court's determination for clear error." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). "A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App at 459.

The trial court order following the termination hearing cited MCL 712A.19b(3)(g) as a statutory basis for termination. Termination is proper under MCL 712A.19b(3)(g) when "[t]he

[3] MCL 712A.2(b)(2) provides that it is proper for the trial court to assume jurisdiction over a minor child "[w]hose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent . . . is an unfit place for the juvenile to live in."

parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age."

Respondent-father is confused as to the statutory ground under which his parental rights were terminated and erroneously presents arguments against termination under MCL 712A.19b(3)(h). Despite his mislabeling, respondent-father's underlying allegation of error is correct. Respondent-father argues, and we agree, that the trial court erred in determining that his incarceration deprived his children of proper care and custody. "Incarceration alone is not a sufficient reason for termination of parental rights." *In re Mason*, 486 Mich 142, 146; 782 NW2d 747 (2010). The trial court's decision to terminate respondent-father's parental rights based solely on respondent-father's incarceration without consideration as to his ability to provide proper care and custody through relatives was clear error. Our Supreme Court's opinion in *In re Mason, supra*, held that "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." 486 Mich at 160. The trial court in *In re Mason* terminated the respondent-father's parental rights under MCL 712A.19b(3)(h) and MCL 712A.19b(3)(g), among other grounds. Our Supreme Court interpreted the grounds in (3)(g) to be "factually repetitive and wholly encompassed by MCL 712A.19b(3)(h)" and faulted the trial court under both subsections for prematurely terminating the respondent father's parental rights before "evaluating whether [respondent-father] could care for his children in the future, either personally or through his relatives." *Id*. at 164-165.

"Placement with an appropriate relative during incarceration can constitute proper care and custody." *Id*. at 163-164. In *In re Mason*, as in the instant case, the children were placed with the respondent-father's relatives by DHS. The Supreme Court in *In re Mason* noted the fact that DHS placed the children with respondent-father's family first, but presumed that respondent-father would have placed the children with the very same people. *Id*. at 163. More important was the Supreme Court's conclusion that "it was unnecessary for [respondent-father] to make ongoing arrangements with the relatives that would permit him to preserve his rights and remain in contact with his sons." *Id*. at 164.

In the instant case, the child placement arrangement of respondent-father's children with his parents was not given any weight by the trial court in arriving to the conclusion that respondent-father was unable to provide for the proper care and custody of his children. Placement with relatives is not a determinative factor but the trial court here completely failed to consider the effect of the children's placement with respondent-father's family. *Id*. at 169. "This option adds significance to the court's [additional] failure to consider MCL 712A.19a(6)(a), which establishes that initiation of termination proceedings is not required when the children are 'being cared for by relatives' although a parent is not personally able to be a primary caregiver for the children." *Id*. We conclude that the trial court clearly erred when it determined that a statutory ground for termination of parental rights existed under MCL 712A.19b(3)(g) without consideration of whether respondent-father could care for his children in the future, either personally or through his relatives.

III. DUE PROCESS

Respondent-father next argues that he was denied his right to procedural due process as a result of the trial court failing to allow him to participate in the termination hearing by telephone. We agree.

"Whether a child protective proceeding complied with a person's right to due process is a question of constitutional law reviewed de novo." *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). The "fundamental requisite of due process of law is the opportunity to be heard . . . at a meaningful time and in a meaningful manner" before an impartial decision maker after being afforded notice of the nature of the proceedings. *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009) (citations omitted).

Petitioner asserts that the trial court was not obligated to accommodate respondent-father's appearance by telephone because according to *In re BAD*, 264 Mich App 66, 71; 690 NW2d 287 (2004), MCR 2.004 only applies when the person is incarcerated in the Michigan Department of Corrections. The trial court cited the same reason for denying respondent-father's request to appear by telephone. Although we concur with the trial court that MCR 2.004 is inapplicable to respondent-father because he was incarcerated outside the Michigan Department of Corrections, the question remains whether the court denied respondent-father due process in refusing him meaningful participation in the termination hearing. MCR 3.973(D)(2) provides that "[t]he respondent has the right to be present" or "may appear through an attorney" at a dispositional hearing. *In re Mason* further held that "to comply with MCR 2.004, the moving party and the court must offer the parent 'the opportunity to participate in' each proceeding in a child protective action." 486 Mich at 154.

The United States Supreme Court in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976), set forth a three-part test for evaluating due process issues:

> 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.

Application of the factors in *Eldridge* leads us to the conclusion that the trial court should have allowed respondent-father to participate by phone in the termination hearing. The private interest involved here has been explained by the United States Supreme Court to be a "fundamental liberty interest." *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). The pivotal "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." *Id.* This private-interest factor leans in respondent-father's favor. Second, the risk of an erroneous deprivation was substantial given that respondent-father would have had the most accurate information regarding his incarceration and would be the only one who could testify as to his plans to provide for the proper care and custody of his children. This factor too therefore, favors respondent-father.

Petitioner urges this Court to require respondent to demonstrate what defense the excluded parent would have presented in opposition to the case brought against him in absentia. Petitioner's request ignores the fact that the most able of counsel crafts a defense to the actual proofs as they are presented and not to the bald allegations in a complaint. Appellate counsel are not required to reverse engineer a defense for an excluded parent whose fundamental rights were at risk. We note that in *United States v Cronic*, 466 US 648, 658-659; 104 S Ct 2039; 80 L Ed 2d 657 (1984), the United States Supreme Court declined to require that a criminal defendant, who was either denied counsel in toto or denied counsel at a critical stage, prove that a particular error was outcome determinative. Similarly, we find that the failure to allow respondent to participate in the termination hearing by telephone, and thereby to provide counsel the essential resource for a defense, access and collaboration with his client, is a "circumstance of [such] magnitude" as to allow us to presume prejudice. 466 US at 660.

The third *Eldridge* factor concentrates on the state's interests in upholding the procedure respondent-father complains he was deprived of, a telephone call. According to the record, respondent-father's attorney knew how to call respondent-father and knew respondent-father would be available for a certain period of time. The trial court did not cite, and we cannot think of, any administrative or fiscal burden in allowing counsel to use the court's telephone to allow respondent-father to testify.

The trial court's failure to consider relative placement in its evaluation of whether respondent-father could provide proper care and custody, as well as its refusal to allow respondent-father to participate by phone, compels us to reverse the order terminating respondent-father's parental rights in this case.

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

/s/ Cynthia Diane Stephens
/s/ Henry William Saad
/s/ Mark T. Boonstra