STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SKYLER LEROY MCBRIDE, ALEXANDER GARAND MCBRIDE and SAWYER DALE MCBRIDE, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

RONALD D. MCBRIDE, JR.,

Respondent-Appellant,

and

SUSAN MCBRIDE,

Respondent.

UNPUBLISHED
July 15, 2008

No. 282062
Bay Circuit Court
Family Division
LC No. 06-009381-NA

In the Matter of SKYLER LEROY MCBRIDE, ALEXANDER GARAND MCBRIDE and SAWYER DALE MCBRIDE, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

SUSAN MCBRIDE,

Respondent-Appellant,

and

RONALD D. MCBRIDE, JR.,

Respondent.

No. 282243
Bay Circuit Court
Family Division
LC No. 06-009381-NA

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

I concur with the majority's determination that the trial court properly terminated respondent-mother's parental rights. I also agree that the trial court erred by finding that respondent-father waived his right to counsel. However, I respectfully disagree that the deprivation of respondent-father's right to counsel constitutes harmless error.

I. Background Facts and Proceedings

On September 14, 2006, the Department of Human Services (DHS) filed a petition seeking circuit court jurisdiction of the three involved minor children. The petition alleged that respondent-father was incarcerated after his conviction of first-degree criminal sexual conduct, with an earliest release date of June 30, 2015.

A referee conducted a preliminary hearing on the day the petition was filed. Although respondent-mother was incarcerated in the Bay County Jail at the time of the preliminary hearing, she appeared at the hearing with appointed counsel. The prosecutor advised the referee that petitioner had not provided respondent-father with notice of the child protective proceedings. Neither the referee nor the prosecutor articulated a specific plan to include respondent-father in future hearings, to determine his interest in the proceedings, or to appoint counsel for him. The referee signed an order authorizing the petition and placing the children in foster care, and scheduled a September 29, 2006 pretrial hearing. The prosecutor mailed a copy of the referee's September 14, 2006 order and notice of the September 29, 2006 hearing to respondent-father's address at the Carson City Correctional Facility.

On September 18, 2006, petitioner sent respondent-father a copy of the petition by registered mail. The post office delivered it to the Carson City Correctional Facility mailroom, where someone at the prison acknowledged its receipt. Petitioner filed a proof of service with the trial court, but did not file a pleading or motion stating that the Michigan Court Rules required a telephonic hearing that included respondent-father.

On September 29, 2006, the trial court conducted an adjudication hearing. Respondent-father did not attend by telephone, and was not represented by counsel. At the conclusion of the hearing, Kelly McBride, respondent-father's sister, asked the court whether respondent-father could continue visiting with his children at the prison. The record reveals the following exchange:

> *The Court:* Well, have they been regularly going to the prison to visit him?
>
> *Kelly McBride:* Well, when they get a ride up there, yes, they do. The[y] go and see 'im.

The Court: I'm not requiring that and I'm not permitting that at this point. All right.

Once we make some progress, we'll see what the—what the situation should be, but as—as of today, I'm certainly not gonna require foster parents to transport kids to a prison to visit their dad, so—

Kelly McBride: Even their grandparents can't—

The Court: No.

Kelly McBride: Okay.

The Court: And we'll determine—You know, we can talk about that more if that's an issue and the children are highly bonded to their father and they've been up there frequently. You need to let D.H.S. know that because if there's some emotional harm that comes to them from not seeing him, that's an issue I'd consider.

But if it's something where—

The Prosecutor: We can address that on November 6th—

* * *

The Court: —we'll address it at the hearing. Which is just a month away anyway, so, okay.

All right. Thank you, everyone. We'll sign an adjudication order. We'll see you back here November 6th at 2:30.

Respondent-father did not telephonically attend the dispositional review hearing conducted on November 6, 2006, and once again did not have counsel. The trial court observed that a proof of service reflected service of notice of the hearing on respondent-father in prison, "but at this point because of the fact that he's going to be in for many more years, we don't need to bring him in—um—for the hearings." Later in the hearing, the trial court noted that visitation with respondent-father had been "suspended … because he is not available due to his imprisonment."

Respondent-father did not telephonically attend the dispositional review hearings conducted on February 7, 2007, March 26, 2007, May 7, 2007, or the July 30, 2007 permanency planning hearing. Respondent-father also did not have counsel for any of those proceedings. On August 27, 2007, the prosecutor filed a petition seeking termination of both respondents' parental rights, and arranged for personal service of a copy of the petition and notice of the hearing on respondent-father. On September 13, 2007, the prosecutor filed a "motion for order to allow incarcerated party to participate in a telephonic proceeding." The trial court granted the motion and sent a copy of its order to the warden of the Carson City Correctional Facility.

Respondent-father appeared telephonically at the October 10, 2007 termination hearing, and immediately requested appointed counsel. The following exchange occurred:

> *The Court:* Well, it's a little late to appoint counsel at this date. Um, as far as I'm concerned, you know, we've got the proofs ready to go today. And you—if—you've been notified prior that if you wanted an attorney to represent you, you should have notified the court before then.
>
> Um, I will permit you to be present by telephone, if you wish to be present. And I'll allow you to testify, if you wish to testify. But I don't think it's appropriate when this case is ten—well, it's over a year old, to appoint counsel on the termination date when we haven't had any requests from you or contact from you um requesting that—that right previously. In fact, the only reason we've got you here by telephone today is because the prosecutor's secretary thought that you should be present and set it up.
>
> So, um, your position is that you are opposed to the termination of your parental rights?
>
> *Respondent-Father:* Yes, your Honor.

The trial court advised respondent-father that he could listen to the proceedings and question the witnesses, although the court added that it "may have to cut you off at some point" for the testimony of another witness appearing telephonically.

At the conclusion of the hearing, the trial court stated that it would take its decision "under advisement" and render a bench or written opinion within 28 days. Respondent-father asked the court if he could obtain a transcript of the hearing, and the court replied,

> [Y]ou would have to pay for the transcripts, unless I do—well, he would have to pay for the transcripts, wouldn't he, at this point, because you don't have court appointed counsel.
>
> If . . . the court does a termination, you're … entitled to receive court appointed attorney for an appeal. And at which case, your attorney would receive a transcript at that time.

In its November 7, 2007 written opinion, the trial court invoked MCL 712A.19b(3)(g) and (h) as grounds for terminating respondent-father's parental rights. Subsection (h) allows a court to terminate parental rights if

> [t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, 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.

II. Respondent-Father's Right to Appointed Counsel

The underpinnings of a respondent's right to appointed counsel in parental rights termination proceedings are statutory and constitutional. Our Legislature mandated the appointment of counsel for indigent parents in MCL 712A.17c(5):

> If it appears to the court in a proceeding under section 2(b) or (c) of this chapter that the respondent wants an attorney and is financially unable to retain an attorney, the court *shall* appoint an attorney to represent the respondent. (Emphasis supplied).

In MCR 3.915(B)(1)(b), our Supreme Court reiterated the statutory right to appointed counsel. The court rule requires a trial court to appoint counsel in child protective proceedings if "the respondent requests appointment of an attorney," and the court determines that the respondent is "financially unable to retain an attorney." Notably, neither the Legislature nor the Supreme Court created any exceptions applicable to incarcerated prisoners, despite the existence of a statutory ground favoring termination of parental rights when a respondent is serving a prison sentence of more than two years. MCL 712A.19b(3)(h). Therefore, despite respondent-father's status as a prisoner, he had a right to representation during the child protective proceedings, as well as a right to appointed counsel if he lacked the resources to retain a lawyer.

Furthermore, the Michigan Court Rules provide a specific mechanism for implementing a prisoner's right to counsel in child protective proceedings. MCR 2.004 applies to "actions involving . . . the termination of parental rights," during which a party remains incarcerated under the jurisdiction of the Department of Corrections. The rule provides, in relevant part,

> (B) The party seeking an order regarding a minor child shall
>
> * * *
>
> (2) serve the incarcerated person with the petition or motion seeking an order regarding the minor child, and file proof with the court that the papers were served; and
>
> (3) file with the court the petition or motion seeking an order regarding the minor child, stating that a party is incarcerated and providing the party's prison number and location; the caption of the petition or motion shall state that a telephonic hearing is required by this rule.
>
> (C) When all the requirements of subrule (B) have been accomplished to the court's satisfaction, the court shall issue an order requesting the department, or the facility where the party is located if it is not a department facility, to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call in a hearing or conference, including a friend of the court adjudicative hearing or meeting. The order shall include the date and time for the hearing, and the prisoner's name and prison identification number, and shall be served by the court upon the parties and the warden or supervisor of the facility where the incarcerated party resides.

This court rule establishes a system of dual responsibility for protecting a prisoner's due process right to counsel in child protective proceedings. The prosecutor must serve the prisoner with the petition, and must then file with the court a proof of service specifically stating in the case caption "that a telephonic hearing is required" by MCR 2.004. After the prosecutor accomplishes these tasks, the burden shifts to the trial court to issue an order permitting the prisoner to participate by telephone "in a hearing or conference, including a friend of the court adjudicative hearing or meeting."

The court rules also include an explicit explanation of the purpose of the prisoner's participation by telephone:

> (E) The purpose of the telephone call described in this rule is to determine
>
> (1) whether the incarcerated party has received adequate notice of the proceedings and has had an opportunity to respond and to participate,
>
> (2) whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected,
>
> (3) whether the incarcerated party is capable of self-representation, if that is the party's choice,
>
> (4) how the incarcerated party can communicate with the court or the friend of the court during the pendency of the action, and whether the party needs special assistance for such communication, including participation in additional telephone calls, and
>
> (5) the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate. [MCR 2.004.]

Finally, MCR 2.004 establishes that violations of its procedures render subsequent proceedings invalid:

> (F) *A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule.* This provision shall not apply if the incarcerated party actually does participate in a telephone call, or if the court determines that immediate action is necessary on a temporary basis to protect the minor child. [Emphasis supplied.]

The court rules and MCL 712A.17c(5) must be interpreted in pari materia because these provisions share a common purpose and intent: to ensure that incarcerated, indigent parents are provided counsel and an opportunity to meaningfully participate in child protective proceedings affecting their parental rights. See *People v Tolewitzke*, 332 Mich 455, 457-458; 52 NW2d 184 (1952) (observing that relevant statutory and court rule provisions governing criminal procedure

should be considered together). Additionally, these provisions plainly reflect harmonious conclusions by our Legislature and Supreme Court that the presence of counsel is necessary to ensure an accurate and just result.

In *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982), the United States Supreme Court observed 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." This Court has explicitly recognized that the United States Constitution provides a right to counsel in parental rights termination cases. In *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000), this Court observed, "The constitutional concepts of due process and equal protection also grant respondents in termination proceedings the right to counsel." This Court has also recognized in another case arising from a child protective proceeding that "[t]he right to due process protects individuals who are allegedly incompetent and criminals ultimately convicted of the most heinous crimes." *In re AMB*, 248 Mich App 144, 211; 640 NW2d 262 (2001). In *In re AMB*, the child's mother, KB, was possibly mentally retarded or had some form of developmental delay, and the child's putative father, JB, "was also KB's father." *Id*. at 150. This Court noted that "it is possible to infer that JB raped his mentally disabled daughter, KB, leading to [the baby's] incestuous conception." *Id*. Nevertheless, this Court held that both KB and JB "were entitled to procedural safeguards in this child protective proceeding," which included constitutionally protected rights to counsel and meaningful participation. *Id*.

II. Analysis

Application of MCL 712A.17c(5), MCR 3.915(B)(1)(b) and MCR 2.004 to the facts of this case compels the conclusion that the trial court wrongfully denied respondent-father his rights to counsel, appointed counsel, and to participate meaningfully in the child protective proceedings. In my view, the "string of errors" that deprived respondent-father of these substantial rights "cast doubt on the fundamental fairness of the proceedings." *In re AMB*, *supra* at 235. For the same reasons that harmless error principles do not apply in criminal cases involving structural error, I respectfully disagree that harmless error analysis should be utilized here.

A. Fundamental Rights Denied

In September 2006, petitioner properly served respondent-father with the petition and filed a proof of service with the trial court. The trial court then ignored MCR 2.004(C), which required it to "issue an order requesting the department . . . to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call in a hearing or conference, including a friend of the court adjudicative hearing or meeting." The trial court's failure to comply with MCR 2.004 deprived respondent-father of his right to *any* counsel, retained or appointed. One of the stated purposes of the court rule is "to assure that the incarcerated party's access to the court is protected." By deliberately failing to involve respondent-father at the outset of the proceedings, the trial court violated his right to have an attorney intercede on his behalf, or to communicate his ideas and opinions regarding his children's best interests.

The prosecutor shares some responsibility for the trial court's failure to follow MCR 2.004. The court rule obligates the prosecutor or petitioner to provide in the caption of the petition a statement that "a telephonic hearing is required." MCR 2.004(B)(3). According to my review of the record, no such statement ever appeared in petitioner's pleadings. The court rule explicitly sets forth that "the purpose of the telephone call" is to determine "whether counsel is necessary" and to "assure that the incarcerated party's access to the court is protected." MCR 2.004(E)(2). The inclusion of this provision within the court rule clearly and unambiguously signifies that trial courts conducting child protective proceedings must verbally afford an incarcerated prisoner the right to (1) counsel, (2) appointed counsel, and (3) telephonic attendance of the child protective proceeding, regardless whether the prisoner elects to be represented by counsel.

By failing to follow MCR 2.004, the trial court automatically violated MCL 712A.17c(5), the statute mandating the appointment of counsel when a respondent desires an attorney and lacks the resources to retain one, and MCR 3.915(B)(1)(b), which also creates an undeniable right to counsel when requested by indigent respondents in termination cases. By ignoring all of the pertinent mandates, the trial court deprived respondent-father of his right to participate in the proceedings involving his children until it was far too late for his participation to have any meaning.

B. Harmless Error

Although I acknowledge that MCL 712A.19b(3)(h) creates a virtually irrebuttable presumption in favor of termination of respondent-father's parental rights, in my view the "commanding" liberty interests at stake here,[1] in conjunction with the statutory and court rule mandates for appointed counsel, are entirely stripped of meaning if this Court employs a harmless error analysis. I believe that the complete denial of counsel in a child protective proceeding should presumptively result in prejudice, regardless of a respondent's incarceration.

In the criminal law context, "[t]here are … circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v Cronic*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984). The single "[m]ost obvious" such circumstance, is, "of course, … the complete denial of counsel." *Id.* at 659. In my view, "structural defects in the constitution of the trial mechanism," whether they occur in a criminal or a quasi-criminal setting such as this, "defy analysis by 'harmless error' standards." *Arizona v Fulminante*, 499 US 279, 309; 111 S Ct 1246; 113 L Ed 2d 302 (1991). As the United States Supreme Court pointed out in *Fulminante*, errors occurring during the presentation of a case to a jury may be quantitatively assessed in the context of other evidence, but certain constitutional deprivations, including the right to counsel, "affect[] the framework within which the trial proceeds." *Id.* at 307, 309-310. In the absence of the "basic protections" afforded by constitutional provisions such as the right to counsel, "a criminal trial cannot reliably serve its

[1] In *Lassiter v Dep't of Social Services of Durham, North Carolina*, 452 US 18, 27; 101 S Ct 2153; 68 L Ed 2d 640 (1981), the United States Supreme Court recognized that "[a] parent's interest in the accuracy and injustice of the decision to terminate his or her parental status is … a commanding one."

function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.* at 310 (internal quotation omitted); see also *Penson v Ohio*, 488 US 75, 88; 109 S Ct 346; 102 L Ed 2d 300 (1988), explaining that "actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice," and that "a pervasive denial of counsel casts such doubt on the fairness of the trial process, that it can never be considered harmless error."

Although the instant case does not involve criminal punishment, it unquestionably implicates fundamental rights. *MLB v SLJ*, 519 US 102, 119; 117 S Ct 555; 136 L Ed 2d 473 (1996). In *MLB*, the United States Supreme Court held that Mississippi could not constitutionally require indigent parents appealing the termination of their parental rights to pay record preparation fees. *Id*. at 127-128. In reaching this decision, the Supreme Court majority substantially relied on *Griffin v Illinois*, 351 US 12; 76 S Ct 585; 100 L Ed 2d 891 (1956), which struck down a rule that conditioned appeals of criminal convictions on an indigent defendant's procurement of trial transcripts that he could not afford. *MLB*, *supra* at 110. Although the *MLB* dissenters argued that *Griffin* should not be extended to civil cases involving the termination of parental rights, the *MLB* majority rejected that argument for reasons that resound with equal energy here:

> [W]e have repeatedly noticed what sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody. To recapitulate, termination decrees work a unique kind of deprivation. In contrast to matters modifiable at the parties' will or based on changed circumstances, termination adjudications involve the awesome authority of the State to destroy permanently all legal recognition of the parental relationship. Our *Lassiter* and *Santosky* decisions, recognizing that parental termination decrees are among the most severe forms of state action have not served as precedent in other areas. We are therefore satisfied that the label "civil" should not entice us to leave undisturbed the Mississippi courts' disposition of this case. [*Id*. at 127-128 (internal quotation omitted.]

Further, the United States Supreme Court has never utilized harmless error analysis in the context of a deprivation of the right to counsel derived from the Fourteenth Amendment. In *Douglas v California*, 372 US 353, 355; 83 S Ct 814; 9 L Ed 811 (1963), the Supreme Court grounded an indigent appellant's rights to appointed counsel in the Fourteenth Amendment's Equal Protection Clause. In *Anders v California*, 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967), the Supreme Court held that a court could not deny appellate representation to a criminal defendant based on the appointed counsel's representation that an appeal lacked merit. Twenty-five years after deciding *Douglas*, the Supreme Court in *Penson* determined that application of harmless error review "would leave indigent criminal appellants without any of the protections afforded by *Anders*." *Penson*, *supra* at 86. The *Penson* Court rejected the notion that an appellate court's independent review of the record could substitute for the assistance of counsel because that result "would render meaningless the protections afforded by *Douglas* and *Anders*." *Id*.

In my view, the majority's application of harmless error review in this case renders meaningless Michigan's statutory and court rule imperatives that the trial court appoint counsel for parents embroiled in termination proceedings. Although respondent-father may be a

despicable man inevitably destined to lose his parental rights, I believe that new proceedings must be initiated because the trial court denied him even the barest semblance of due process, and in doing so created a result that qualifies as inherently contaminated and fundamentally unfair.[2]

The appointment of counsel in termination proceedings is a procedural norm in this state. Counsel is required in every case in which the state seeks to terminate a parent's rights, despite that in a substantial number of termination proceedings reaching the appellate courts, the facts overwhelmingly support the petitioner. As appellate judges know, there are few "close calls" among the termination cases appealed. Although the results are often predictable, Michigan law requires the appointment of counsel in *all* parental rights termination cases, even those involving incarcerated prisoners, for multiple important reasons.

First, it is beyond debate that even incarcerated parents enjoy a liberty interest in the care and custody of their children. "The fundamental liberty interest of parents with regard to their children permeates Michigan laws." *Ryan v Ryan*, 260 Mich App 315, 333; 677 NW2d 899 (2004). Our law recognizes that counsel is a necessity, not a luxury, when the state attempts to permanently deprive a parent of any aspect of this critically important liberty interest. Second, by protecting the right to counsel in termination cases with the double safeguards of both a statute and court rule, our law also ensures that every parent, even the most unsavory, receives a fair trial with inherent integrity.

In my view, an indigent Michigan parent's right to appointed counsel when facing termination of his or her parental rights is best protected by uniform and predictable enforcement of that right, which may be achieved only if trial courts adhere to statutory and court rule mandates. I would hold that as in criminal cases, the complete denial of counsel during a critical stage of the proceedings—the adjudication hearing and termination trial—requires reversal. This is, after all, the remedy prescribed in MCR 2.004(F):

> A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule.

This case is readily distinguishable from those involving an isolated failure of appointed counsel to attend a dispositional hearing or another similar, but limited, event in the course of the adjudicative process. Rather, the remedy set forth in MCR 2.004(F) should be reserved for cases such as this, in which the trial court failed to recognize respondent-father's right at the outset of

[2] The trial court assumed from the outset that respondent-father's presence was unnecessary "because of the fact that he's going to be in [prison] for many more years." This assumption ignored the potentially positive role that respondent-father or his counsel could nevertheless play in planning for his children or encouraging respondent-mother's compliance with the case service plan. Further, at the adjudication hearing the trial court acknowledged that it would "consider" whether the children would suffer "some emotional harm . . . from not seeing" respondent-father, yet never did so due to its failure to include respondent-father as a participant in the proceedings.

the proceedings, failed to ever ascertain respondent-father's interest in and need for appointed counsel, and refused to appoint counsel during the termination hearing itself.[3]

I recognize that the remedy or result I propose probably has a foregone conclusion, and will also occasion some delay in placing the involved children for adoption. However, I believe this result compulsory. The trial court denied respondent-father the most rudimentary form of due process. It did so in a case that forever severed respondent-father's substantial and compelling liberty interest in future association with his children. In the criminal law arena, trial court errors of this magnitude yield automatic reversal, despite the risk that an unquestionably guilty defendant may go free. Here, no realistic risk exists that respondent-father will ever reunite with his children. Nevertheless, because the trial court's decision to terminate respondent-father's parental rights lacks any inherent integrity, in my view it should not stand affirmed.

/s/ Judge Gleicher

[3] I view the trial court's errors as egregious. At the termination hearing, the trial court advised respondent-father that "the only reason we've got you here by telephone today is because the prosecutor's secretary thought that you should be present and set it up." The majority's decision affirms that the trial court's profound and readily professed ignorance of the rules remains uncorrected.