

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of MARIAH MONE' McKISSACK
and SARIYAH MIRANDA McKISSACK,
Minors.

DEPARTMENT OF HUMAN SERVICES, f/k/a
FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

GREGORY McKISSACK,

Respondent-Appellant,

and

SUNJAH MONIQUE HARRIS, JOHNATHON
McCALEBB, and DEANDRE JONES,

Respondents.

In the Matter of MARIAH MONE' McKISSACK,
SARIYAH MIRANDA McKISSACK, DESTINY
LENAE JONES, and TYREE DE' MARCO
HARRIS, Minors.

DEPARTMENT OF HUMAN SERVICES, f/k/a
FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

SUNJAH MONIQUE HARRIS,

Respondent-Appellant,

and

UNPUBLISHED
January 24, 2006

No. 262816
Wayne Circuit Court
Family Division
LC No. 03-419427-NA

No. 262817
Wayne Circuit Court
Family Division
LC No. 03-419427-NA

GREGORY McKISSACK, JOHNATHON
McCALEBB, and DEANDRE JONES,

Respondents.

Before: Murray, PJ. and Jansen and Kelly, JJ.

PER CURIAM.

In these consolidated appeals, respondents Gregory McKissack and Sunjah Monique Harris appeal as of right the trial court's order terminating the rights of respondent Harris to all of the minor children under MCL 712A.19b(3)(c)(i), (g), and (j), and terminating the rights of respondent McKissack to Mariah and Sariyah on the same grounds as under MCL 712A.19b(3)(a)(ii). We reverse and remand for further proceedings.

Respondent McKissack argues on appeal that the trial court lacked jurisdiction to terminate his parental rights because he was not served notice of the ongoing child protective proceedings before the termination trial. Whether a trial court has personal jurisdiction over a party is a question of law that this Court reviews de novo. *In re SZ*, 262 Mich App 560, 564; 686 NW2d 520 (2004). These proceedings began with a preliminary hearing on May 23, 2003. The petition was amended to state that respondent McKissack was the legal father of Mariah and Sariyah on June 12, 2003. Following a number of dispositional review hearings and a permanency planning hearing, a supplemental petition seeking the termination of respondents' parental rights was filed on or about August 24, 2004. According to the record presented on appeal, respondent McKissack, who was incarcerated within the Michigan Department of Corrections from the inception of the proceedings until October 2004, was not served with notice of any kind concerning these proceedings until August 30, 2004, when he appears to have been served by certified mail with notice of a September 7, 2004, pretrial hearing. On November 16, 2004, respondent McKissack executed a waiver of notice pertaining to the permanent custody trial set for January 27, 2005.

In *In re Brown*, 149 Mich App 529, 541; 386 NW2d 577 (1986), this Court noted that "MCL 712A.12 requires that a parent not having custody of a child be personally served with notice of the petition and the time and place for hearing." In *In re Mayfield*, 198 Mich App 226, 231; 497 NW2d 578 (1993), this Court similarly noted that "[a]fter a probate court determines that a petition should be authorized, a parent not having custody of a child must be served with notice of the petition and the time and place of the adjudicative hearing." The failure to personally serve a parent as required by MCL 712A.12 is a jurisdictional defect that renders subsequent orders emanating from the proceedings void. *In re Brown, supra* at 542. Some cases state more specifically that a failure to provide notice of termination proceedings by personal service as required by MCL 712A.12 is a jurisdictional defect that renders all proceedings in the family court void with respect to the individual who was deprived of service. *In re Terry*, 240 Mich App 14, 21; 610 NW2d 563 (2000); *In re Atkins*, 237 Mich App 249, 250-251; 602 NW2d 594 (1999). In *In re AMB*, 248 Mich App 144, 173; 640 NW2d 262 (2001), this Court more broadly stated that "the absence of notice to a respondent in a child protective proceeding constitutes a jurisdictional defect making all proceedings void with respect to that respondent."

See also *In re SZ, supra* at 564 (“A parent of a child who is the subject of a child protective proceeding is entitled to personal service of a summons and notice of proceedings”).

Thus the court lacks personal jurisdiction over a respondent until that person is personally served with notice or executes a written waiver of notice pursuant to MCL 712A.12, or until substituted service is achieved in compliance with MCL 712A.13.¹ In the instant case, the trial court lacked jurisdiction over respondent McKissack until he executed a waiver of notice pertaining to the termination hearing of January 27, 2005. All proceedings before the termination hearing itself were void with respect to respondent McKissack because he was not properly notified of them. *In re Mayfield, supra* at 231; *In re Brown, supra* at 541-542. Although we find reversal required for other reasons, we conclude that the trial court did not lack personal jurisdiction over respondent McKissack to terminate his parental rights.²

Respondent McKissack asserts, and we agree, that the lack of notice to him throughout these proceedings until the termination trial constituted a denial of due process requiring reversal. This Court discussed procedural due process in the context of termination proceedings in *In re AMB, supra*. The court stated:

A procedural due process analysis requires a court to consider “(1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient.” [*Id.* at 209, quoting *Jordan v Jarvis*, 200 Mich App 445, 448; 505 NW2d 279 (1993), citing *Dep’t of Corrections v Thompson*, 490 US 454, 460; 109 S Ct 1904; 104 L Ed 2d 506 (1989).]

A parent’s right to care for his or her children is undeniably a liberty interest that is affected by child protective proceedings. *In re AMB, supra*; *In re Render*, 145 Mich App 344, 348; 377 NW2d 421 (1985). The constitutional sufficiency of the procedure may be tested by the balancing test set forth in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976):

Identification of the specific dictates of due process generally requires consideration of three distinct factors: 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,

¹ Substituted service may be done by registered mail or by publication if the judge is satisfied that it is impracticable to personally serve such notice. However, this Court has held that MCL 712A.13 “requires that the trial court first determine that personal service is impracticable.” *In re Adair*, 191 Mich App 710, 714; 478 NW2d 667 (1991). In the instant case there was no such determination, and it appears that personal service was not impracticable, as respondent McKissack was incarcerated within the state of Michigan.

² However, for respondent McKissack, the termination hearing was the initial dispositional hearing, and the statutory grounds for termination of his parental rights were therefore required to be established by clear and convincing, legally admissible evidence. MCR 3.977(E)(3).

including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail. [*In re AMB, supra* at 209.]

There is no question that the interest in caring for one's child is a compelling one. *In re Render, supra* at 148. We believe that the risk to respondent McKissack of an erroneous deprivation was significantly increased by his exclusion from the proceedings for over a year while respondent mother and respondent Jones were provided treatment plans directed toward reunification. If he had been notified of the proceedings, provided with counsel,³ and allowed to participate, respondent McKissack could have put forward a plan for the children and could have undertaken any services available in prison to move toward reunification. Particularly in view of his prompt and apparently earnest participation after his release, it is reasonable to conclude that, had he known of the proceedings, respondent McKissack would have undertaken any available remedial actions even while incarcerated.

The burden on the state to notify respondent McKissack of these proceedings was negligible, as it appears that his whereabouts were actually known. Indeed, the "burden" was no more than a minimal obligation that was entirely ignored by petitioner and the court below. As respondent McKissack notes on appeal, the court and petitioner failed throughout the proceedings to comply with MCR 2.004, which requires that incarcerated respondents in child protective proceedings be contacted by telephone to determine, among other things, whether the incarcerated party has received adequate notice and has had an opportunity to respond and participate, whether counsel should be appointed, how the incarcerated party may communicate with the court, and the manner in which the incarcerated party may participate in future proceedings. MCR 2.004(C), (D)(1), (2), (4), (5). While the court rule does not establish constitutional parameters, it does express the judgment of our Supreme Court that the burden of notifying incarcerated respondents of child protective proceedings and assuring them an opportunity to participate is justified by concerns for essential fairness.

Because the lack of notice was not raised in the trial court, it requires reversal only if it constituted plain error affecting the substantial rights of respondent McKissack. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). It is clear that the lack of notice to respondent father was plain error. *Id.* at 763. We further conclude that the error did affect respondent father's substantial rights. *Id.* The court relied heavily on the duration of the case when terminating parental rights; yet all of the proceedings except the termination trial itself were void with respect to respondent McKissack. *In re Mayfield, supra* at 231; *In re Brown, supra* at 541-542. Perhaps because of respondent McKissack's absence throughout the earlier proceedings, the court appeared to give short shrift to his recent efforts, not mentioning them in its findings of fact. The agency worker recommended termination of respondent McKissack's parental rights based solely on the children's need for permanency and a suitable home, without reference to respondent McKissack's recent efforts or indeed to any fact personal to him. As we have already noted, respondent McKissack began to participate in a treatment plan promptly upon his release from incarceration. If he had been notified of these proceedings he could have undertaken parenting classes and any other available services in prison. Especially considering

³ See MCR 3.915(B)(1).

the sparse evidence supporting any of the statutory grounds for termination with respect to respondent McKissack, it appears likely that the outcome would have been different had he been notified of the proceedings, provided with counsel, and allowed to participate in the child protective proceedings in the year preceding the filing of the termination petition. Finally, the inexcusable lack of notice to respondent McKissack was an error “seriously affect[ing] the fairness, integrity, or public reputation of judicial proceedings.” *Carines, supra* at 764. Therefore, reversal is required.

We also conclude that the trial court clearly erred by finding that respondent McKissack deserted the children, MCL 712A.19b(3)(a)(ii), that he failed to provide them with proper care and custody and would be unable to do so within a reasonable time, MCL 712A.19b(3)(g), and that there was a reasonable likelihood that the children would be harmed if returned to him. MCL 712A.19b(3)(j). There was no evidence of desertion on the record. Indeed, respondent McKissack promptly embarked on a treatment plan upon his release from prison in October 2004. There was similarly no evidence that the children would be harmed if returned to respondent McKissack. Assuming that the bare fact of respondent McKissack’s incarceration may establish a failure to provide proper care and custody for the children, the record lacks evidence to clearly establish that he would be unable to do so within a reasonable time. On the record provided, it appeared reasonably likely that he would be able to provide for the children in a matter of months, as he had housing that was at least minimally adequate, and was to be released from his tether in May 2005. The record did not address respondent McKissack’s parenting skills one way or another. In the instant case, respondent McKissack only came within the court’s jurisdiction at the time of the termination trial, although he began working on a treatment plan before that time. We note that the clear and convincing standard of proof applied to the termination of parental rights is a requirement of due process. *Santosky v Kramer*, 455 US 745, 767; 102 S Ct 1388; 71 L Ed2d 599 (1982). The evidence supporting the conclusion that respondent McKissack would be unable to properly care for the children within a reasonable time – his admission that he would probably test positive for marijuana on the day of the termination trial and his lack of employment at the time of trial – falls far short of that standard, so that reversal is required.

With respect to respondent Harris, we conclude that the trial court did not clearly err by finding at least one statutory ground for termination was established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The conditions of adjudication were respondent Harris’s history of drug abuse, and lack of housing or income. At the time of the termination trial, she had not completed drug treatment. She began treatment in August 2003, but stopped attending in October 2003. She again began treatment in January 2005. Respondent Harris tested positive for marijuana on September 27, 2003, and on December 15, 2003, and failed to provide screens for months at a time before her January 2005 re-entry into treatment. At the time of the termination trial, respondent Harris was providing drug screens, which were negative. However, she indicated on the day of trial that she would probably test positive for marijuana. Given that respondent Harris was still using marijuana on the day of the termination trial, the trial court did not clearly err by finding that her drug problem

continued to exist.⁴ Moreover, where respondent Harris has not demonstrated sobriety for any substantial length of time throughout these proceedings, had only entered treatment weeks before the termination trial, and reported that she would likely test positive for marijuana on the day of the termination trial, we cannot conclude that the trial court was more than “maybe” or “probably” wrong, *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999), in concluding that she would not successfully address her substance abuse problem in the reasonable future. We conclude that the trial court did not clearly err by terminating respondent Harris’s parental rights under MCL 712A.19b(3)(c)(i), (g), and (j).

However, in light of our reversal of the termination of respondent McKissack’s parental rights, termination of respondent Harris’ parental rights at this time would be clearly contrary to the children’s best interests. MCL 712A.19b(5). We note the evidence that the children are strongly bonded with their mother and have a good relationship with her, and that she visited them consistently until visits were suspended by virtue of the filing of the petition seeking termination of her parental rights. The eldest child in this matter is adamantly opposed to termination of her parental rights. Moreover, because the termination of respondent McKissack’s parental rights must be reversed, the goal of permanency for Mariah and Sariyah will not be furthered by affirming the termination of respondent Harris’s parental rights at this time.

Reversed and remanded for further proceedings consistent with this opinion. This Court does not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

⁴ The evidence was somewhat less clear concerning respondent mother’s housing. The agency worker testified that the house was not large enough for the children but admitted that it could have been assessed before two of the children were removed from the court’s jurisdiction and placed in a guardianship. Also, the evidence indicated that respondent Harris had become employed recently before the termination hearing.