

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ILARIO NUNE DUNCAN-
TUGMAN, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

LARRY DONALDSON, JR.,

Respondent-Appellant.

UNPUBLISHED

May 25, 2010

No. 294066

Kent Circuit Court

Family Division

LC No. 07-055129-NA

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Respondent Larry Donaldson, Jr., appeals as of right the order of the trial court terminating his parental rights to his minor child pursuant to MCL 712A.19b(3)(a)(ii), (g), and (j). We affirm.

Respondent contends for the first time on appeal that the trial court violated his due process right to counsel by failing to appoint counsel to represent him until the proceedings had been pending for almost one year. We disagree. We review respondent's unpreserved claim of constitutional error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). An error affects substantial rights if it causes prejudice, meaning that it affects the outcome of the proceedings. *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

A respondent in a child protective proceeding has a due process right to counsel. *In re EP*, 234 Mich App 582, 597-598; 595 NW2d 167 (1999), overruled on other grounds by *In re Trejo Minors*, 462 Mich 341, 353 n 10; 612 NW2d 407 (2000). This right is further provided for by statute and court rule. See MCL 712A.17c; MCR 3.965(B)(5); MCR 3.915(B)(1). A putative father, however, is not a "respondent" in a termination proceeding. See *In re Gillespie*, 197 Mich App 440, 446; 496 NW2d 309 (1992) (interpreting the former court rule). Pursuant to MCR 3.977, "respondent" includes the natural or adoptive mother of the child and the father of the child as defined by MCR 3.903(A)(7), which does not include a man who is a putative father only.

When the child in this case was removed by the agency, respondent was identified as a putative father only. As a putative father, respondent was not a “father” as defined by MCR 3.903(A)(7), and therefore was not a “respondent” entitled to the appointment of counsel. After the case had been pending before the trial court for almost one year, a report was introduced during a permanency planning hearing in October 2008, demonstrating the results of a paternity test that established respondent as the father of the child. At the conclusion of that hearing, the trial court appointed counsel to represent respondent.

Respondent nevertheless argues that the foster care case manager testified several months earlier in April 2008 that she learned the results of the paternity test and that respondent was in fact the biological father. Respondent therefore argues that the trial court should have appointed counsel to represent him at that time, instead of waiting until the report was introduced into evidence at the later hearing. Respondent, however, did not make an appearance at the April 2008 hearing and was not determined to be the child’s father at that proceeding. MCR 3.903(A)(7). Further, respondent cannot establish and points to no prejudice that arose from not being represented by counsel before the appointment was made. No action was taken between April and October 2008 to terminate his parental rights; in fact, respondent’s parental rights were not terminated until approximately nine months after he had been appointed counsel. Further, even prior to respondent being proven to be the biological father of the child, respondent was nonetheless offered an opportunity to work with the agency toward gaining custody of the child, but declined to participate. After being appointed counsel, respondent continued his same level of nonparticipation and did not attempt to work toward gaining custody of the child until two weeks before the termination hearing.

Because respondent has not demonstrated that the trial court’s failure to appoint counsel between April 17, 2008, and October 21, 2008, in any way affected the outcome of the proceedings, we hold that there has been no demonstration of plain error affecting substantial rights. We further note that a respondent does have “some minimum responsibility” in having counsel appointed. See *In re Hall*, 188 Mich App 217, 218; 469 NW2d 56 (1991), in which the trial court terminated the appointment of counsel when the respondent failed to maintain contact with appointed counsel. While we do not today define the level of that responsibility, we note that respondent in this case did not demonstrate even a minimum level of responsibility in pursuing the appointment of counsel or otherwise pursuing reunification with his child.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Stephen L. Borrello