

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of MAKYLA WILLIAMS, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MICHAEL WILLIAMS, SR. and LASHAWNDA
MASJAY WRIGHT,

Respondents-Appellants.

FOR PUBLICATION
November 24, 2009

No. 289260
Berrien Circuit Court
Family Division
LC No. 2008-000027-NA

Before: Owens, P.J., and Servitto and Gleicher, JJ.

GLEICHER, J. (*concurring*).

I concur with the result reached by the majority. I write separately to express my view that respondent father's right to appointed counsel attached at the outset of the proceedings, rather than when petitioner filed the supplemental permanent custody petition identifying him as a respondent. I believe that when the circuit court deprived respondent-father of the custody of his child, fundamental due process principles required that the circuit court offer respondent father appointed counsel in accordance with MCR 3.915(B)(1). I also write separately to elaborate on the reasons why I view the deprivation of counsel as highly prejudicial error in this case.

At the adjudication trial, petitioner recommended against respondent father having custody of Makyla and the referee unquestioningly accepted this recommendation. Despite respondent father's persistent requests for custody and his undisputed fitness, the referee inexplicably ordered Makyla's placement with petitioner. Petitioner's expressed opposition to respondent father's custody of his child and the referee's determination at the adjudication that "transferring this child back to the home of either parent would be inappropriate and would potentially cause more harm than any good that can come of it," functionally altered respondent father's status from that of a nonoffending parent to that of a respondent. When petitioner and the referee articulated that Makyla would be at risk in respondent father's custody, he qualified as a de facto respondent notwithstanding the absence of any formal allegations against him.

The importance of a parent's "essential" and "precious" right to raise his child is well-established in our jurisprudence. *Hunter v Hunter*, ___ Mich ___, ___ NW2d ___ (2009) (Docket No. 136310, decided July 31, 2009), slip op at 8-9. Because "[t]his right is not easily

relinquished,” “to satisfy constitutional due process standards, the state must provide the parents with fundamentally fair procedures.” *Id.* at 9 (internal quotation omitted). As our Supreme Court acknowledged in *Hunter*, “where the parental interest is most in jeopardy, due process concerns are most heightened.” *Id.* at 22.

Fundamental due process principles required that petitioner and the referee consider respondent father a respondent, and inform him at the adjudication trial of his right to appointed counsel. This is so because petitioner sought to deprive respondent father of his fundamental right to custody of Makyla for an unspecified period, and the referee agreed to this proposal. “There is no question that parents have a due process liberty interest in caring for their children.” *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001). Child protective proceedings that divest a nonoffending parent of his child’s custody implicate that liberty interest, regardless whether the petitioner has *formally* identified the parent as a respondent.

In my view, the process due when a court deprives a nonoffending parent of his child’s custody should be determined by balancing the three factors described in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976):

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.

These factors recognize that due process “is flexible and calls for such procedural protections as the particular situation demands.” *Id.* at 334, quoting *Morrissey v Brewer*, 408 US 471, 481; 92 S Ct 2593; 33 L Ed 2d 484 (1972).

Here, application of the *Eldridge* factors compels the conclusion that the referee should have offered respondent father appointed counsel at the adjudication trial and at every hearing conducted thereafter. First, the private interest of a parent in the care, custody and control of her children is one of the oldest fundamental liberty interests recognized by the United States Supreme Court. *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000). “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Prince v Massachusetts*, 321 US 158, 166; 64 S Ct 438; 88 L Ed 645 (1944). Because respondent father possessed a substantial and constitutionally protected interest in maintaining custody of Makyla, the first *Eldridge* factor weighs heavily in favor of his right to appointed counsel.

The second *Eldridge* factor considers the risks of error inherent in a proceeding. Here, the risk of erroneously depriving respondent father of his custodial right qualified as substantial. Without assistance from counsel, respondent father lacked the ability to fully comprehend that although he had not been formally named as a respondent, his fundamental right to custody hung in the balance during each and every hearing conducted in this case. Thus, a substantial risk existed that respondent father would suffer an erroneous deprivation of his custody of Makyla, despite that no evidence proved his unfitness. Appointed counsel would have identified the

complete absence of allegations of respondent father's unfitness, and would have reminded the court that because Makyla spent her days in respondent father's home, the evidence strongly supported that she would remain safe in his custody.

Counsel additionally could have argued that if petitioner intended to use respondent father's sarcoidosis as a ground for terminating his rights, it first had to fully investigate the actual extent of his disability, and then offer services addressing any pertinent physical limitations.¹ Counsel would have emphasized that the foster care workers who testified in support of depriving respondent father of custody premised their opinions solely on a one-page form containing minimal diagnostic information, and that the workers had not actually spoken to the physician or determined that he possessed an understanding of the issues presented in a child welfare case. Counsel would have pursued additional medical information, pointed out that respondent father resided in a stable home with parents who assisted him when necessary, and would have vigorously challenged petitioner's claim that the sarcoidosis disqualified respondent father from raising his child. Lacking counsel's assistance, respondent father had no opportunity to advocate that under the ADA, his sarcoidosis served to *enhance* petitioner's obligation to initiate meaningful reunification efforts.

The third *Eldridge* factor involves the state's interests. Admittedly, appointment of counsel would impose on the state a financial burden. But this burden became inevitable once petitioner formally announced its intent to terminate respondent father's parental rights. Affording counsel during the months that petitioner deliberately sought to deprive respondent father of Makyla's custody likely would have spared the expense of repeating these proceedings, and would have contributed to a more reliable outcome. After balancing the *Eldridge* factors, I conclude that due process required that the circuit court afford respondent father the right to appointed counsel when it first ordered that Makyla reside outside his custody.

In *Lassiter v Dep't of Social Services of Durham Co, North Carolina*, 452 US 18, 31; 101 S Ct 2153; 68 L Ed 2d 640 (1981), the United States Supreme Court described the following hypothetical situation in which appointment of counsel would be required in a child protective proceeding:

If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.

In my view, this is such a case. Irrespective that the applicable state statute and court rule did not mandate the appointment of counsel for respondent father before petitioner formally

¹ Undoubtedly, counsel additionally would have highlighted that the burden of proof obligates *petitioner* to establish respondent father's unfitness, physical or otherwise, by clear and convincing evidence. MCR 3.977(A)(3); MCL 712A.19b(3). The case worker testimony in this case suggests that petitioner improperly shifted to respondent father the burden of substantiating his physical fitness.

identified him as a respondent, I believe that basic notions of procedural due process triggered that right when the court denied his requests for custody of his child.

Furthermore, I believe that additional and compelling reasons support that the deprivation of respondent father's right to counsel at the permanency planning and termination hearings cannot qualify as harmless error. The initial petition filed in this case did not mention respondent father's pulmonary disease or any concern about his physical ability to parent Makyla. At the dispositional hearing, foster care worker Amanda Forrester admitted that she needed additional information from respondent father's physician concerning the physician's conclusion that respondent father's condition would prevent him from raising a child. When asked, "[Y]ou don't see any reason why he can't provide care with . . . the assistance of his family members as it's going on," Forrester replied, "No." At the dispositional review hearing, the referee took note that respondent father received ongoing treatment for sarcoidosis, and identified reunification as the permanency plan. Not until petitioner filed the supplemental petition did it first assert that respondent father's medical condition prohibited him from caring for his child. And at the termination hearing, the evidence marshaled in support of terminating respondent father's rights concentrated almost exclusively on his alleged physical limitations.

Had the referee appointed counsel for respondent father, counsel certainly would have raised several legal arguments on respondent father's behalf that likely would have significantly affected the proceedings. First, counsel would have recognized from the outset of the proceedings that respondent father's pulmonary sarcoidosis potentially qualified him for services under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.* The ADA requires the petitioner "to make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services." *In re Terry*, 240 Mich App 14, 25; 610 NW2d 563 (2000). "[I]f the FIA fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family." *Id.* at 26. Petitioner undisputedly failed to make any reasonable accommodations for respondent father, notwithstanding that it utilized his sarcoidosis as the primary basis for terminating his parental rights. Counsel also would have recognized that because the circuit court had not conducted an adjudication of the allegations against respondent-father, petitioner was limited to presenting legally admissible evidence in support of terminating his parental rights. *In re CR*, 250 Mich 185, 205-206; 646 NW2d 506 (2002).

Finally, little evidence in the record supported a conclusion that respondent father lacked the capacity to parent Makyla because of his physical limitations. The form filled out by respondent father's physician described only that he needed assistance with meal preparation, shopping, laundry and housework. These limitations, standing alone and in the absence of any evidence of unfitness, do not amount to clear and convincing grounds on which to terminate a parent's fundamental constitutional right to custody of a child. Furthermore, the physician's hearsay opinion that respondent father's medical condition would "keep him from being able to parent/raise a 4-month old child until he is an adult," without more, does not constitute legally admissible, clear and convincing evidence of unfitness. Had counsel appeared on respondent father's behalf, the inherent weaknesses of the one-page medical form, and its lack of clear evidentiary support for termination, would have been stressed. Counsel also could have presented evidence on behalf of respondent father, emphasized his ongoing commitment to caring for and financially supporting his daughter, and argued that no evidence supported that he

ever had failed to provide proper care or custody for the child. Given the weak evidence supporting termination and the strength of contrary arguments that an attorney could have presented, the outcome of the proceedings likely would have differed in the presence of counsel.

/s/ Elizabeth L. Gleicher