Order

Michigan Supreme Court
Lansing, Michigan

March 15, 2024

166192

In re VALDEZ-DRUMM/DRUMM/VALDEZ, Minors.

SC: 166192
COA: 367545
Ingham CC Family Division:
21-000976-NA
21-000977-NA
21-000978-NA
21-000979-NA

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By order of December 15, 2023, while retaining jurisdiction, we remanded this case to the Ingham Circuit Court for a redetermination of the respondents' request for appointed appellate counsel. On order of the Court, the circuit court's opinion on remand having been received, the application for leave to appeal the August 31, 2023 order of the Court of Appeals is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the order of the Court of Appeals and REMAND this case to the Ingham Circuit Court to appoint appellate counsel and to file a claim of appeal for each respondent in accordance with MCR 3.993(D)(3), which shall constitute a timely filed claim of appeal for the purposes of MCR 7.204. See generally *Halbert v Michigan*, 545 US 605 (2005); *People v Hill*, 501 Mich 949 (2018); *People v Nehmeh*, 501 Mich 882 (2017); *People v Anthony*, 496 Mich 863 (2014).

BOLDEN, J. (*concurring*).

I write separately to explain why, given the unique circumstances of this case, I concur with this Court's order. On the surface, this case appears to be a simple question of jurisdiction: the Court of Appeals dismissed as untimely respondents' claim of appeal by right. Underneath the surface, the record shows that indigent respondents were left to navigate a complex appellate process without the assistance of counsel to which they were entitled.

In this termination-of-parental-rights case, respondent-father and respondent-mother were appointed counsel in the trial court. However, after their parental rights were terminated, the trial court judge denied both respondents' requests for appointment of appellate counsel.

The dissenting statement asserts that there was not any reason for this Court to "question the soundness of the trial court's initial determination" regarding indigency. The record demonstrates otherwise. In their motions for appointment of appellate counsel, respondent-mother reported that she had zero income and respondent-father's reported income was unclear and the handwriting nearly illegible. The trial court denied their motions without any findings to support why appellate counsel could not be appointed. Notably, as a practical matter, both respondents were previously found to be indigent, trial counsel was appointed to represent them for the duration of the case, and the court presided over the termination proceedings; thus, the court was likely aware of both respondents' financial situations throughout the termination proceedings. I believe the record clearly provides a basis to question the denial of appointment of appellate counsel. Unsurprisingly, on remand, both respondents were found to be indigent.[1]

Considering the trial court's initial denial of appointed appellate counsel, it is understandable that respondents struggled with seeking appellate review. See *Gordon v Gordon*, 510 Mich 1020 (2022) (MCCORMACK, C.J., concurring) (highlighting the difficulties of navigating appellate procedures absent counsel and noting that some litigants face such difficulties even in high-stakes situations, like when the right to parent a child is at stake). The denial of appointed counsel seemingly led to the denial of any appellate review of the orders that terminated respondents' constitutional rights to parent their children. Especially now that both respondents have been found to have been indigent, it seems likely that the erroneous decision denying the appointment of appellate counsel meaningfully affected the fairness of their attempt to appeal. Given the unique circumstances of this case, I agree with this Court's order to vacate the August 31, 2023 order of the Court of Appeals and to remand this case to the Ingham Circuit Court for the appointment of appellate counsel and for the filing of claims of appeal that shall be considered timely.

VIVIANO, J. (*dissenting*).

This Court now completes the error it made when it previously remanded this case to the trial court for a "redetermination" of whether respondents were entitled to appointed counsel on appeal. I did not join that order but instead voted to deny leave because the Court of Appeals correctly dismissed respondents' claim of appeal in that court for lack of jurisdiction due to respondents' failure to timely file their claim. MCR 7.204(A)(1).

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[1] Respondent-father submitted proof of payment with his yearly gross income totaling $32,581.00.

Moreover, despite being told how to proceed by then Chief Judge GLEICHER —file a timely delayed application for leave to appeal in that court—respondents also failed to do so.[2]

It is, of course, black-letter law that the time limits for filing a claim of appeal or application for leave to appeal are jurisdictional. See MCR 7.204(A); MCR 7.205(A). Yet without providing any legal authority, this Court's prior order remanding to the trial court for a "redetermination" of indigency was designed to let respondents circumvent these jurisdictional rules. And, if ignoring our own jurisdictional rules was not bad enough, the Court decided to do so without identifying any error in the lower courts' holdings. The trial court had ruled that respondents were not entitled to court-appointed appellate counsel after correctly determining, based on the evidence submitted with the request, that respondents were not indigent. No one has seriously contended otherwise.[3]

But, letting neither the law nor the facts get in the way of its desired outcome, this Court remanded to the trial court for a "redetermination" of its prior ruling and required

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[2] In her August 31, 2023 order, then Chief Judge GLEICHER advised that "[a]ppellants may seek to appeal the July 11, 2023 order terminating parental rights by filing a delayed application for leave to appeal in this Court within 63 days after entry of that order, i.e., by September 12, 2023. MCR 3.993(C)(3); MCR 7.205(A)(3)." *In re Valdez-Drumm*, unpublished order of the Court of Appeals, entered August 31, 2023 (Docket No. 367545).

[3] In her concurrence, Justice BOLDEN remarks that respondent-father's motion for appointment of appellate counsel "was unclear and . . . nearly illegible" regarding his income. I agree that the motion was somewhat "unclear" because respondent-father apparently mixed up "net" and "gross" income and indicated that he was paid both "weekly" and "every two weeks." But even giving him the benefit of the doubt, he reported that his gross biweekly income was $1,823—an annual income of $47,398—which exceeded 200% of the federal poverty guidelines. See Department of Human Health and Services, *Annual Update of the HHS Poverty Guidelines*, 88 Fed Reg 3424 (January 19, 2023) (providing that the federal poverty guideline is $19,720 for a family of two). The trial court clearly did not abuse its discretion in denying respondent's initial request for appointed appellate counsel based on the information presented. An argument could be made that once the trial judge has determined that counsel is required to protect the rights of an indigent parent who is contesting the termination of parental rights at the initial hearing, absent a change in circumstances, counsel should be appointed on appeal. See, e.g., *In re Sanchez*, 422 Mich 758, 760-761 (1985). However, even if the *Sanchez* rule were to be extended beyond the circumstances of that case (i.e., the nonconsensual termination of parental rights of a noncustodial parent under the stepparent adoption provision of the Michigan Adoption Code, MCL 710.51(6)), submission of a financial statement showing a party is not indigent would obviously qualify as a change in circumstances barring application of the *Sanchez* rule.

the trial court to "make specific findings of fact regarding the respondents' declaration of indigency and financial ability to retain appellate counsel and issue a written opinion . . . within 60 days . . . ." *In re Valdez-Drumm*, 513 Mich ___, ___; 997 NW2d 909, 909 (2023).[4] The trial judge dutifully complied with this ukase, confirming in a tongue-in-cheek order that its prior ruling was correct based on the evidence presented, but determining that respondents are now entitled to a court-appointed lawyer based on newly submitted evidence.[5]

Instead of vacating its lawless order, the Court now follows through on it by remanding this case to the trial court for the appointment of appellate counsel and the filing of a claim of appeal for each respondent under MCR 3.993(D), "which shall constitute a timely filed claim of appeal for the purposes of MCR 7.204." But the cases the Court cites do not support its irregular action in allowing these parties a third bite at the appellate apple.

In *Halbert v Michigan*, the United States Supreme Court held that criminal defendants who enter a plea of *nolo contendere* in Michigan are entitled to appointed counsel when their application for leave to appeal in the Court of Appeals provides the "first-tier" of appellate review. *Halbert v Michigan*, 545 US 605, 609-610 (2005). But *Halbert* does not purport to create any rights for respondents in termination-of-parental-rights cases. And in any event, no one disputes that respondents were entitled to appointment of counsel if they were able to prove that they were indigent. MCR 3.993(A) ("In any appeal as of right, an indigent respondent is entitled to appointment of an attorney to represent the respondent on appeal and to preparation of relevant transcripts."). For these reasons, it is unclear why the majority even cites *Halbert*.

The other cases cited in the Court's order are also inapt—they each remanded for a new appeal because each defendant lost an appellate right "through no fault of his own[.]" *People v Anthony*, 496 Mich 863, 863 (2014); see also *People v Hill*, 501 Mich 949 (2018); *People v Nehmeh*, 501 Mich 882 (2017). The same cannot be said here, where respondents initially submitted financial information that was insufficient to establish indigency and,

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[4] All of these specific directives were very curious, since there is no requirement that a trial judge make specific findings or issue a written opinion every time a litigant requests court-appointed counsel. See MCR 3.993(D). The implied criticism is even more off-putting in light of the fact that the trial judge issued his initial ruling on a form approved by the State Court Administrative Office.

[5] The circuit court noted that respondents initially submitted a financial schedule showing that they "netted $2,400 every two weeks, which exceeded 200% of the Federal poverty guidelines," but it held that "[r]espondents are . . . entitled to a lawyer on appeal notwithstanding the inaccurate financial statement submitted."

after that, failed to follow the clear direction from the Court of Appeals as to the filing of a delayed application for leave.

The Court should acknowledge its mistake and vacate its previous order. There is no legal support for waiving the jurisdictional requirements of the Court of Appeals for sympathetic litigants.[6] Nor was there any reason to question the soundness of the trial court's initial determination regarding indigency. Because there was no legal or factual support for the Court's prior order, I do not believe it can serve as the foundation for the present remand order. Therefore, I respectfully dissent.

ZAHRA, J., joins the statement of VIVIANO, J.

[6] See *Alabama Legislative Black Caucus v Alabama*, 575 US 254, 283 (2015) (Scalia, J., dissenting) ("[A]llowing appellants a second bite at the apple invites lower courts similarly to depart from the premise that ours is an adversarial system whenever they deem the stakes sufficiently high. Because I do not believe that Article III empowers this Court to act as standby counsel for sympathetic litigants, I dissent."); Wistrich, Rachlinski & Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 Tex L Rev 855, 859 (2015) ("The idea that one set of rules applies to the sympathetic litigant and another set applies to the unsympathetic litigant is not consistent with the rule of law.").