

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
September 21, 2010

In the Matter of E. D. GRECH, III, Minor.

No. 295290
Wayne Circuit Court
Family Division
LC No. 00-390210-NA

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

E. D. Grech, Jr. contests the termination of his parental rights to the minor child alleging the improper assertion of jurisdiction by the trial court based on the failure to comply with the “reasonable efforts” mandate and error by the trial court in not taking into account Grech’s pending appeal of his criminal convictions, which could make him available to care for the minor child. We affirm.

The Department of Human Services (DHS) initiated a previous petition regarding this child in 2000. The rights of the biological mother, A. Kincer were terminated following this petition, but Grech retained his parental rights. The minor child again came to the attention of the DHS in 2009 due to his alleged physical neglect. The child was residing with his biological mother, A. Kincer, even though her parental rights had been terminated eight years ago in the earlier proceeding. When this petition was initiated it was alleged that Grech had a criminal record, including a drug conviction and an assault with intent to murder conviction resulting in his incarceration with an earliest release date of May 2016. Kincer also had a recent conviction for drug trafficking and was awaiting sentencing. The minor child was placed in foster care.

Relative placement was not initially investigated because a family member was not identified. At the pretrial hearing, Grech’s appointed counsel was replaced by a retained attorney who informed the court that Grech was unable to attend because of the lack of adequate notice due to his incarceration. A bench trial was requested and the trial court was informed, “no relatives have come forth to plan for the child.” At trial, the child protective services worker, Marina Chapman, testified that the investigation revealed the minor child was living with Kincer even though her rights to this child and other children had previously been terminated. Kincer indicated that Grech placed the minor child in her care in 2005. Despite having the child in her care, Kincer failed to enroll the child in school for fear that her having physical custody of the child would be discovered. Testimony was elicited that the minor child was socially and developmentally delayed and lacked certain basic self-care and academic skills that would be expected for a child of this age. Chapman acknowledged that she had no direct contact with

Grech who was currently incarcerated and serving a nine to 25 year sentence because of the emergency nature of the referral. Although Kincer was previously asked to identify any family members who would desire to be involved in planning for the child's care, she failed to identify anyone. During the pendency of the case, Chapman was made aware of a paternal aunt, D. Grech, who declined to provide care for the minor child when contacted.

Grech admitted to being incarcerated since May 2005 for his assault with intent to murder and felony firearm convictions. Several months later Grech asserted he was notified of a guardianship petition involving the maternal grandfather for the child. Grech last had direct contact with Kincer in October 2006 and was reassured the minor child was doing well under the guardianship. Grech indicated that his earliest release date was May 2016 but that he had filed state and federal appeals of his convictions. The referee precluded Grech from testifying regarding his habeas corpus petition finding it speculative and irrelevant. Grech identified M. Joseph, a 23 year-old cousin of Kincer, as being willing to care for the minor child pending his release from prison. The trial court adopted the referee's recommendation to terminate Grech's parental rights in accordance with MCL 712A.19b(3)(g) [failure to provide proper care or custody], (h) [imprisonment and child deprived of normal home for more than two years], and (j) [child likely to be harmed if returned to parent's care.].

Grech does not directly challenge the court's determination that the minor child was without proper care or custody or that he was unable to care for the child due to his incarceration, which supports the court's assumption of jurisdiction. Rather, Grech contends that the error was in the failure to expend "reasonable efforts" for reunification. At the outset we would note that DHS properly exercised its discretion when it filed a permanent custody petition.¹ Because termination of parental rights was the stated goal of DHS from the initiation of proceedings, it had no obligation to provide Grech with reunification services.² To the extent that Grech claims that reasonable efforts were not expended to provide him services to achieve reunification, his claim must fail.

While Grech was not present for the preliminary examination due to his incarceration he was entitled to participate by telephone.³ Although "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," this preclusion "shall not apply if the court determines that immediate action is necessary on a temporary basis to protect the minor child."⁴ There can be no question that placement of this child comprised an emergent situation given the evidence of neglect, his residence with the biological mother whose rights had been terminated several years ago and the ongoing incarceration of Grech.

¹ MCL 722.638; MCR 3.977(E).

² *In re Terry*, 240 Mich App 14, 25 n 4; 610 NW2d 563 (2000).

³ MCR 2.004.

⁴ MCR 2.004(F).

Although there is a statutory requirement that “the supervising agency shall, within 30 days, identify, locate, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child’s developmental, emotional, and physical needs as an alternative to foster care,”⁵ Grech was not directly contacted. Kincer was queried and denied the availability of an interested relative for placement. The reliance of DHS on this assertion by Kincer was not unreasonable given the fact that the child had been in her care for the past four years. The child’s paternal aunt, identified by Grech, demurred from accepting responsibility for the child. Joseph, the only alternative person identified by Grech, did not comply with the statutory definition of a “relative.”⁶ The record also did not support Joseph’s viability as a caretaker for the minor child as she was only 23 years of age and did not have independent housing. Grech also misconstrues the preference for relative or family placements.⁷ The intent of such placements is to benefit the minor child, not to accommodate the parent. The focus is on the best interests of the child and a court is not obligated to place a child with relatives.⁸

Grech cannot demonstrate that the failure to contact him when the petition was initiated precluded him from subsequently participating in planning for the minor child. While not participating in the preliminary examination, he was represented by counsel in all subsequent proceedings and was an active participant. This does not alter the fact that Grech was incarcerated with an earliest release date of May 2016 and was unavailable to provide or care for the minor child. Nor did Grech show good judgment in turning the care of the minor child over to Kincer following his conviction based on the previous termination of Kincer’s rights to this child and others.

We find Grech’s second contention of error to be disingenuous. Grech claims error in the court’s failure to consider the possibility of an earlier release from prison because he had filed appeals in state and federal courts. Proceedings pertaining to termination occurred in 2009. Grech’s state appeals of his convictions were denied in 2006.⁹ Grech filed a habeas corpus petition in the federal district court on March 27, 2007. As of January 3, 2008, two of Grech’s federal claims were stayed and his third claim was dismissed without prejudice. Stay of the claims was “conditioned on Petitioner filing a motion for relief from judgment in the trial court within sixty (60) days of [January 3, 2008].”¹⁰ There is no subsequent record, from the date of

⁵ MCL 722.954a(2).

⁶ MCL 712A.13a(1)(j) defines a “relative” as “an individual who is at least 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew, niece, first cousin or first cousin once removed, and the spouse of any of the above, even after the marriage has ended by death or divorce.”

⁷ MCL 712A.1(3).

⁸ *In re IEM*, 233 Mich App 438, 453; 592 NW2d 751 (1999).

⁹ *People v Grech*, 477 Mich 917; 722 NW2d 872 (2006).

¹⁰ *Grech v Berghuis*, unpublished order of the Federal District Court, entered January 3, 2008 (Docket No. 07-11311).

the federal district court order to the present evidencing Grech having pursued this appeal, as the federal case remains closed.

At this point the minor child has been in foster care for over one year. He has not had contact with Grech in five years. To suggest that the child should continue to wait to proceed with his life and needs because his father speculates that an appeal of his convictions is viable and may afford him an earlier release date is ludicrous. Grech was certainly aware that his state law appeal was not viable, having been denied in 2006, when he made the assertion in this appeal and at the trial court level that he sustained a reasonable hope that his criminal convictions would be successfully appealed and he would procure an early release. This child's future cannot be held hostage based on mere speculation and conjecture.

The trial court properly terminated Grech's parental rights based on his incarceration and inability to provide care and custody for the minor child.¹¹ When convicted, he left the minor child in the care of Kincer, whose rights to the child had been previously terminated. While this petition was pending, the child was already approximately eleven years of age and Grech had not interacted or provided care for the child in the immediately preceding four-year period. Even if Grech obtains his release from prison at the earliest possible date, it will be too late as the child will have or be within only months of attaining adulthood. Ultimately, the trial court was guided by its determination of what was in the best interests of the child, not the preferences or unsubstantiated hopes of the parent. Upon finding that statutory grounds existed for termination of parental rights the trial court was required to terminate Grech's rights in accordance with the best interests of the child.¹²

Finally, we acknowledge that Grech has filed supplemental authority suggesting it was error to terminate his parental rights based on his incarceration.¹³ Having reviewed the authority cited, we find it distinguishable from the facts of this case and reject Grech's contention of error. Grech's parental rights were properly terminated in accordance with MCL 712A.19b(3)(h), which requires:

The parent is imprisoned for such a period that [1] the child will be deprived of a normal home for a period exceeding 2 years, *and* [2] the parent has not provided for the child's proper care and custody, *and* [3] 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.¹⁴

In contrast to the supplemental authority cited by Grech, the facts of this case meet all of the above criteria.

¹¹ MCL 712A.19b(3)(g), (h).

¹² MCL 712A.19b(5).

¹³ See *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).

¹⁴ *Id.* at 160-161.

The minor child in this instance was deprived of a normal home environment for four years preceding the initiation of the petition. Grech was incarcerated and knowingly turned the minor child over to his biological mother, despite the earlier termination of her parental rights to the child. Evidence indicated the child was socially and educationally deprived due to the mother's fear that the child's residence with her would be discovered. Not only did Grech not personally provide care or custody for the minor child during this time period, he did not seek to assure that the person he authorized to care for the child during his absence was capable or even minimally appropriate. Given Grech's incarceration and potential release dates there existed no reasonable expectation that he could provide for the minor child "within a reasonable time" given the child's current age. Unlike the cited case, while Grech did not participate in one hearing, he was consistently and actively involved, personally and through his counsel, in all subsequent proceedings and efforts were made to secure the child a placement with relatives, albeit unsuccessful. One of the relatives identified by Grech declined to provide care for the minor child. The only other individual identified by Grech did not meet the definitional criteria of MCL 712A.13a(1)(j) and was deemed not suitable based on her personal circumstances. We further note that the factual circumstances of this case are distinguishable from that of the supplemental authority cited based on the emergent conditions. This child was living in circumstances of deprivation with an individual who was not entitled to provide his care and custody. There was a demonstrable and measurable negative impact on the wellbeing of this child following Grech's incarceration and decision to place the child with an unsuitable caretaker. It was necessary for the DHS to work quickly and expediently to provide for this child's immediate needs and to compensate for four years of deprivation and the absence of any identifiable family members to provide care and custody.

We find Grech's attempt to apply the ruling of the cited supplemental authority to the circumstances of this case misplaced and unavailing.

Affirmed.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio