STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
November 16, 2010

In the Matter of HOLLINS, Minors.

No. 296968
Wayne Circuit Court
Family Division
LC No. 98-369248-NA

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM .

Respondent father (hereinafter respondent) appeals the order terminating his parental rights to the two minor children pursuant to MCL 712A.19b(3)(j) (reasonable likelihood that children will be harmed if returned to parent). Because the trial court itself ordered that reasonable efforts be made to reunify respondent with his children, and because the record is devoid of any evidence showing that petitioner Department of Human Services (DHS) prepared a case service or treatment plan, provided services to respondent, or made any efforts whatsoever to assist in reunification, we are required to reverse the order of termination under the applicable statutes, especially in light of our Supreme Court's decision in *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).

The original petition filed by the DHS on October 27, 2008, requested termination of respondent-mother's parental rights based on prior terminations and an ongoing wardship relative to three other children, none of whom were fathered by respondent. The petition listed respondent as the putative father and noted his criminal activity and incarceration, but it did not seek termination of his parental rights. A preliminary hearing on the petition was held on October 29, 2008, at which both respondents belatedly appeared. The DHS representative indicated that, to the extent that respondent did not subsequently and independently provide a plan for the children, the DHS would later amend the petition to seek termination of respondent's parental rights. The children had been removed from their home, taken into protective custody, and placed in foster care. The referee authorized the petition. An amended petition filed on March 13, 2009, indicated that the DHS now sought termination of respondent's parental rights, as well as respondent-mother's parental rights.

The parties and court convened on June 22, 2009, for purposes of an adjudication trial to give the court jurisdiction. The court first accepted affidavits of parentage executed by the respondents relative to the two minor children. Both respondents also testified as to respondent being the father of the children, and the court then recognized him as the legal father. No trial was conducted as the respondents made admissions giving the court jurisdiction and waived their

rights to a trial. Speaking to respondent, the court stated that, if termination was not to occur, it was important for him to contact his family and quickly arrange for a home to be ready for the children. Respondent informed the trial court that he was currently incarcerated and presently could not provide a home for the children. The court agreed to a three-month window in order to give respondent an opportunity to plan relative to family assistance and housing, and it ordered an evaluation with the Clinic for Child Study. The trial court told respondent that he could not live with the children in a home in which respondent-mother resided, considering her previous terminations and the danger she presented. The court did inform respondent that he and the children could live with other family members, and the court emphasized to respondent the importance of him finding a job as soon as possible. The court stated, "Put food on the table, a roof over your head, keep it warm. Have running water, hav[e] electricity, this is what I'm looking for. You hearing me?" The order of adjudication signed by the trial court provided, in part, that "[r]easonable efforts shall be made to preserve and reunify the family to make it possible for the child(ren) to safely return home." It is abundantly evident that the court contemplated the possibility of the children returning to respondent's care in the future.

Following a disposition hearing on September 21, 2009, the court entered an order which again provided that "[r]easonable efforts shall be made to preserve and reunify the family to make it possible for the child(ren) to safely return home." This order also provided that "[t]he parent . . . shall comply with, and benefit from, the case service plan." The record reflects that in November 2009, respondent was one again incarcerated; this time for fleeing and eluding.

The termination trial took place on February 17, 2010. There was testimony by respondent and by a psychologist with the Clinic for Child Study who interviewed and evaluated the family members. During closing arguments, respondent's counsel stated:

> Your Honor, I would ask the Court not to terminate the father's rights. These are his first children. He's never been before this Court before. He's never been given a treatment plan. He's about to be released from [jail] so his incarceration would not interfere with him starting to work on a treatment plan.
>
> His interaction with the children according to the clinician was very good. He had a very warm and caring manner with them and treated them appropriately . . . .

Counsel proceeded to argue that it is not proper to terminate parental rights if a parent desires a treatment plan and never receives one and that, absent such a plan and timely and intensive services, it is not possible to make the assessment under MCL 712A.19b(3)(j) that there exists a reasonable likelihood that the children will be harmed in the future. Counsel indicated that respondent had shown a willingness to comply with a treatment plan and one should be and should have been provided to respondent. The trial court did not address the argument concerning the lack of a treatment plan and services, and it ruled that termination was proper under MCL 712A.19b(3)(j). The court made its ruling on the basis that respondent had spent

most of his time in jail since the birth of the children, that respondent had a lengthy, extensive criminal record, much of it as a juvenile, and that respondent was a long-time drug user.[1]

On appeal, respondent presents multiple arguments in favor of reversal. In part, he contends that termination was premature because the DHS failed to make reasonable efforts at reunification, failed to provide respondent with a case treatment plan, and failed to provide services to respondent. We agree.

Reasonable efforts to reunify a child and a parent must be made in all cases except where the parent has subjected the child to aggravated circumstances as detailed in MCL 722.638(1) or (2), where the parent has been convicted of certain violent crimes against the child or another child of the parent, or where the parent has had rights to the child's siblings terminated. MCL 712A.19a(2). MCL 722.638(1) and (2) address circumstances involving different forms of child abuse, conduct that places a child at an unreasonable risk of harm, and prior terminations. None of the aggravating circumstances outlined in MCL 712A.19a(2) and MCL 722.638(1) and (2) exist here. Indeed, the order of September 21, 2009, did not have marked the box which indicates that reasonable efforts were not required due to an aggravated circumstance under MCL 722.638(1) and (2).

In *Mason*, 486 Mich 142, the trial court terminated the respondent's parental rights because the respondent was incarcerated during the proceedings. The Supreme Court observed that the mere inability to presently care for one's child as a result of incarceration does not constitute a basis for termination. *Id.* at 160. The Court further observed that "just as incarceration alone does not constitute grounds for termination, a criminal history alone does not justify termination," except where the conduct falls under MCL 712A.19a(2) or MCL 722.638(1) and (2). *Id.* at 165. Again, those provisions are not implicated here. Reviewing the statutory criteria applicable to case service or treatment plans, the Court stated:

> The failures of the DHS and the court also directly violated their statutory duties. If the court orders placement of a child outside the child's home, the DHS must prepare an initial services plan within 30 days of the child's placement. MCL 712A.13a(8)(a). Before the court enters an order of disposition, the DHS must prepare a case service plan, which must include, among other things, a "[s]chedule of services to be provided to the parent, child, and if the child is to be placed in foster care, the foster parent, to facilitate the child's return to his or her home or to facilitate the child's permanent placement." MCL 712A.18f(3)(d). "If a child continues in placement outside of the child's home, the case service plan shall be updated and revised at 90-day intervals. . . ." MCL 712A.18f(5). Further, at each review hearing, the court is required to consider, among other things, "[c]ompliance with the case service plan with respect to services provided or offered to the child and the child's parent, . . . whether the parent . . . has complied with and benefited from those services," and "[t]he extent to which the parent complied with each provision of the case service plan, prior court orders,

[1] The record suggests that respondent's drug use pertained to marijuana.

> and an agreement between the parent and the agency." MCL 712A.19(6)(a) and (c). The court may then modify the case service plan, including by "[p]rescribing additional services" and "[p]rescribing additional actions to be taken by the parent . . . to rectify the conditions that caused the child to be placed in foster care or to remain in foster care." MCL 712A.19(7)(a) and (b). [*Mason*, 486 Mich at 156 (omissions in original).]

Before a court enters an order of disposition, the DHS must prepare a case service plan and make it available to the court and all the parties. MCL 712A.18f(2). The case service plan shall include, in part, efforts to be made by the agency to return the child to his or her home. MCL 712A.18f(3)(c).

With respect to respondent here, a case service plan was not prepared, services were not provided, and no reunification efforts were made by the DHS.

On appeal, the DHS argues that it filed an original petition requesting termination of respondent's and respondent-mother's parental rights, that the referee at the preliminary hearing found that reasonable efforts at reunification were unnecessary, and that reasonable efforts to reunify need not be made when a petition seeks termination. Contrary to the DHS's claims, it did not seek to terminate respondent's rights in the original petition, nor did the referee at the preliminary hearing rule that reasonable efforts at reunification were unnecessary.

We do note that until June 22, 2009, the date set for the adjudication trial, respondent was deemed the putative father. And the statutory provisions that require the DHS to make reasonable efforts at reunification and to provide services apply "to *a parent*, not to a putative parent." *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008) (emphasis in original). By the time that respondent was recognized as the legal parent based on the affidavits of parentage and testimony before the court, the amended petition had been filed and the DHS was now seeking to terminate respondent's rights. We recognize that services are not mandated in all situations, *In re Terry*, 240 Mich App 14, 25 n 4; 610 NW2d 563 (2000), and that services "need not be provided where reunification is not intended," *LE*, 278 Mich App at 21. However, even though the DHS was seeking termination of respondent's parental rights and did not intend for reunification, the trial court contemplated the possibility that respondent could be reunified with the children. The trial court ordered, after finding that respondent was the legal father and regardless of the fact that termination of respondent's rights was now requested, that "[r]easonable efforts shall be made to preserve and reunify the family to make it possible for the child(ren) to safely return home." And the court later ordered respondent to comply with and benefit from a case service plan, which was never forthcoming.

Given the statutory provisions cited above and the trial court's direct orders, which the court itself ultimately ignored, the DHS was required to prepare a case service or treatment plan, was required to provide services to respondent, and was required to make efforts at reunification. Our review of the record shows that no such actions and efforts were undertaken by the DHS. Accordingly, termination of respondent's parental rights was premature. See *Mason*, 486 Mich at 152 (failure to adhere to statutory requirements rendered termination premature). Therefore, remand is necessary in order to allow respondent the opportunity to take advantage of and benefit from a service plan, reunification efforts, and DHS services.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.[2]

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro

[2] To the extent that respondent argues, absent consideration of the DHS's failures alluded to above, in favor of outright reversal of the termination order *and* the closing of the case based on a failure to establish a statutory ground for termination and to show that termination was in the best interests of the children, we find that there was no clear error in regard to either finding. MCL 712A.19b(3)(j) and (5); MCR 3.977(K). We also note that respondent's argument that the trial court violated his due process rights by not allowing him to meaningfully participate in the proceedings because of his incarceration lacks support in the record. Indeed, the court went out of its way to make sure respondent was present at hearings and, when obstacles related to respondent's jailing prevented or delayed his presence at a hearing, the court either delayed or adjourned the hearing. The court even provided appointed counsel to respondent before paternity was established in order to fully protect his rights.