STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
May 1, 2012

In the Matter of O. JOHNSON, Minor.

No. 306065
Genesee Circuit Court
Family Division
LC No. 09-125526-NA

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, no evidence supported either ground for termination relied upon by the majority. Specifically, there is no record indication that the Department of Human Services (DHS) involved the respondent-father when preparing his parent-agency agreement (PAA) or actually served him with the initial or updated plans. Moreover, the DHS completely failed to investigate the suitability of a potential relative who was willing to take custody of the child. Given these deficiencies in the child protective proceedings, I would hold the termination decision to be premature.

The DHS petitioned for temporary custody of the then three-month-old child in July 2009, after the mother was arrested at a drug house. The petition averred that respondent, the child's father, was "currently detained in the Genesee County jail" after being convicted of cocaine possession and while awaiting trial for a concealed-weapon charge. The circuit court authorized the petition and subsequently exercised jurisdiction over the child based on the mother's admission to at least some of the petition's allegations.[1]

The DHS prepared a PAA applicable to respondent, requiring him to "participate in any services provided in jail that addresses [sic] parenting, substance abuse, and mental health issues." A DHS worker later admitted that petitioner failed to obtain any "input" from respondent before preparing the PAA. The circuit court record contains only an unsigned copy of the PAA and no proof of service appears in the file.

[1] On appeal, respondent's counsel ordered only the transcript of the termination hearing resulting in gaps in the appellate record. A complete record of the proceedings would have facilitated this Court's review.

The initial service plan (ISP) dated November 10, 2009, states that respondent "is currently incarcerated at Newberry Prison on weapons charges so his history could not be obtained." The ISP relates that Dale Johnson, respondent's father, "has come forward indicating that he would take placement of [the minor child] if her current placement was not going to keep her." The ISP continues, "It was explained that the maternal grandfather wants to keep placement of [the minor child] and Mr. Johnson indicated that if he changed his mind, he would like to be considered for placement rather than seeing his grandchild in foster care."

In March 2010, the DHS moved to change the minor child's placement from the home of her maternal grandfather to foster care. The DHS asserted that the maternal grandfather "does not feel he is adequately able to care for his grandchild due to his increasing demands at work." There is no record indication that the DHS contacted Dale Johnson at that time regarding his willingness to care for the child, or consulted respondent concerning the availability of other paternal relatives. The circuit court approved the change in the child's custody and placed the child with a former babysitter as requested by the maternal grandfather.

According to a July 2011 report authored by a DHS caseworker, respondent continued to be incarcerated in Newberry with an earliest release date of May 12, 2011. The report states, "[Respondent] has been in contact with DHS to discuss his child in care and will call approximately once per month." The next court report, dated September 30, 2010, stated that respondent had failed to contact the DHS "during this reporting period." Respondent reestablished contact in December 2010, and expressed willingness "to comply with any services offered to him." But according to the March 2011 report, respondent's prison misconduct disqualified him for services.

The DHS filed a supplemental petition in March 2011, seeking termination of respondent's parental rights. In May 2011, respondent was released from prison in Michigan and immediately incarcerated in Iowa for a probation violation.

At the July 2011 termination hearing, DHS worker Michelle Kendall testified that petitioner had sent six letters to respondent, but provided no details concerning the letters' contents.[2] She acknowledged that respondent had engaged in at least one program while imprisoned in Michigan, but noted that respondent had become ineligible for services due to his security classification. No evidence supported that any DHS worker had ever discussed with respondent whether his family members should be considered for placement of the minor child. Respondent claimed that he lived with the minor child for the first 26 days of her life, saw her four or five times while he was incarcerated in the Genesee County jail, and his parents were interested in caring for the child during his absence. Respondent further testified that he has a seven-year-old child who lives in Pennsylvania.

[2] The letters to respondent found in the circuit court record contain information about future hearing dates and plans to facilitate respondent's telephonic participation, but do not address the services respondent was required to complete before he could be reunited with his daughter. It is unclear whether these required notices are the "letters" referred to by Kendall.

The circuit court found that respondent's incarceration precluded him from bonding with his child or providing her with any care. In terminating respondent's parental rights, the court reasoned, "As it relates to dad, the statutory sections have been met with clear and convincing evidence to meet those sections unfortunately due to his incarceration."

The record demonstrates that the DHS workers informed respondent of the hearings, and permitted him to attend by telephone. Despite having afforded respondent minimal due process, no evidence before this Court supports that the DHS individually evaluated respondent or meaningfully involved him in the proceedings. Rather, contrary to our Supreme Court's instruction in *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), respondent's incarceration formed the sole basis for the termination of his parental rights.

In *Mason*, our Supreme Court emphasized that "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." *Id.* at 160. The Supreme Court directed the circuit court and the DHS to further consider whether an incarcerated parent "could fulfill his duty to provide proper care and custody in the future by voluntarily granting legal custody to his relatives during his remaining term of incarceration." *Id.* at 163. "Indeed, a child's placement with relatives weighs against termination under MCL 712A.19a(6)(a), which expressly establishes that, although grounds allowing the initiation of termination proceedings are present, initiation of termination proceedings is not required when the children are 'being cared for by relatives.'" *Id.* at 164.

Here, no evidence exists that any DHS worker actually evaluated respondent, assessed his parenting skills, investigated the status of his older child, or considered placement with his father after the maternal grandfather relinquished the child's care. Neither the DHS nor the circuit court knew much about respondent, besides his conviction history. The DHS cannot support a termination petition when its own failure to engage the noncustodial parent leads to "holes" in the record. *In re Rood*, 483 Mich 73, 127; 763 NW2d 587 (2009) (YOUNG, J., concurring in part). Other than allegedly mailing respondent a PAA composed without his participation,[3] the DHS failed to meaningfully involve him in the proceedings. The best that can be said, based on the record before this Court, is that the DHS went through the motions to comply with minimal requirements, but was never invested in the process.

I would further note that petitioner's failure to consider placement with the paternal grandfather violated a court rule. The DHS superficially complied with MCR 3.965(E)[4] and identified Dale Johnson, the paternal grandfather, as a willing relative to care for the child. Although the DHS knew that there was more than one relative potentially able to take custody of the child, there is no record indication that the DHS did anything to investigate whether placement with the paternal grandfather would be in the child's best interests as required by the

[3] Just as in *Mason*, 486 Mich at 157, the circuit court record contains unsigned copies of the ISP and updated PAAs with no verification that the documents were actually served on respondent.

[4] That court rule subsection requires the court to direct the DHS to "identify, locate, and consult with relatives to determine if placement with a relative would be in the child's best interests."

court rule. Instead, the DHS apparently disregarded this known paternal relative in favor of a babysitter chosen by the maternal grandfather as the child's new caregiver.

Accordingly, I respectfully disagree with the majority's determination that the circuit court appropriately terminated respondent's parental rights under MCL 712A.19b(3)(g) (irrespective of intent, the parent fails to provide proper care and custody and no reasonable likelihood exists that she might do so within a reasonable time given the child's age). I would hold, as the Supreme Court did in *Mason*, 486 Mich at 165, that the circuit court erred by failing to consider whether respondent could care for his child in the future through his relatives. I would further find unreasonable the DHS's efforts at reunification, based on the woefully limited contact with respondent described in this record.

I also disagree with the majority's holding that termination was appropriate under MCL 712A.19b(3)(j) (there is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent). I turn again to *Mason*, 486 Mich at 165, for guidance:

> Termination on this ground was clearly erroneous because no evidence showed that the children would be harmed if they lived with respondent upon his release. Significantly, just as incarceration alone does not constitute grounds for termination, a criminal history alone does not justify termination. Rather, termination solely because of a parent's past violence or crime is justified only under certain enumerated circumstances, including when the parent created an unreasonable risk of serious abuse or death of a child, if the parent was convicted of felony assault resulting in the injury of one of his own children, or if the parent committed murder, attempted murder, or voluntary manslaughter of one of his own children . . . . The DHS did not present any evidence suggesting that respondent had ever harmed a child.

Given that petitioner knew next to nothing about respondent and presented no evidence that he ever posed any danger to a child, the circuit court's determination that a reasonable likelihood existed that the child would endure harm if reunited with respondent amounted to pure conjecture. I would hold as improper termination on this ground.

/s/ Elizabeth L. Gleicher