STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
June 12, 2012

In the Matter of T. DEMBNY-REINKE, Minor.

No. 306321/306368
Alpena Circuit Court
Family Division
LC No. 08-006352-NA

Before: BORELLO, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

In these consolidated appeals, mother C. Dembny-Reinke and father K. Lozen appeal as of right from the order terminating their parental rights to the minor child.[1] We reverse and remand for proceedings consistent with this opinion.

A petition was filed on January 27, 2011, to terminate Dembny-Reinke's parental rights to the child, "TDR," then two weeks old. The petition alleged substance abuse, crime, emotional instability, and failure to comply with a parent agency agreement (PAA) as to older child, "LL." In LL's case, the trial court had found that termination was not in LL's best interests. LL was placed in permanent guardianship with her paternal grandparents. Here, LL's father was named as the putative father of TDR.

Dembny-Reinke attended the preliminary hearing, but Lozen was in the Department of Corrections' Reception and Guidance Center. Because his paternity was uncertain, the court allowed the Department Human Services ("DHS") to file an amended petition removing Lozen's name. Dembny-Reinke was then in residential drug treatment. The child had been born with withdrawal symptoms from opiates and was still hospitalized. The withdrawal was from Subutex, which Dembny-Reinke had been prescribed in October 2010. She had admitted to heroin use for the first five months of pregnancy, and Dembny-Reinke and Lozen had been arrested for possession of controlled substances. In LL's case, Dembny-Reinke had substance abuse treatment, parenting classes, a psychological evaluation, and counseling. Dembny-Reinke stated that when pregnant with TDR, she was informed that the baby would not suffer

[1] MCL 712A.19b(3)(g) (failure to provide proper care or custody) and (j) (reasonable likelihood of harm if child returns to parents' home).

withdrawal because she was taking a lesser dose of Subutex. Recent to the hearing, Dembny-Reinke had been caring for LL each weekend.

The preliminary hearing was continued, and an amended petition was filed and sent to Lozen. DHS withdrew the request for termination of parental rights. Dembny-Reinke began to participate in a PAA. She attended counseling, substance abuse treatment, narcotics anonymous ("NA"), and alcoholics anonymous ("AA"). At supervised visits, she was appropriate and brought toys and clothes. TDR was doing well. Nevertheless, the court did not authorize the amended petition. Instead, the court directed DHS to proceed on the first petition seeking termination.

At pretrials in March 2011, Dembny-Reinke's attorney stated that Lozen was TDR's father, and he was sent an affidavit of parentage at the facility where he was incarcerated. At a status conference on May 12, 2011, Dembny-Reinke pleaded to parts of the petition. She admitted that, on October 5, 2010, she and Lozen were arrested by the "HUNT team"[2] at her home. She was charged with two felonies involving heroin, pleaded to one, and was sentenced in March 2011. She was now on probation. Dembny-Reinke also admitted to using heroin during her pregnancy with TDR and that she had been advised that TDR would likely be born addicted. The court accepted the plea and entered an order of adjudication in May 2011.

Regarding Lozen, tests had established his paternity, but he was not represented by counsel because his paternity was not "legally established." DHS felt that Lozen would need separate counsel as Dembny-Reinke and Lozen were not married and their interests were somewhat different.

A supplemental petition was filed June 1, 2011, to terminate Lozen's parental rights. Allegations included a criminal history and failure to cooperate and benefit from services in the case concerning LL. A dispositional hearing was held on June 2, 2011, and an order of disposition entered on June 20, 2011. Lozen was first represented by counsel at a pretrial hearing on June 23, 2011. A judgment of filiation had been entered on May 17, 2011. Lozen's earliest release date was October 2012.

The termination hearing began on July 12, 2011. Lozen was present by speakerphone, as the court denied a motion to have him appear in person. At the hearing, the court agreed to bifurcate the statutory grounds and best-interest hearings, with only legally admissible evidence being considered for the statutory grounds. The court took judicial notice of proceedings involving LL. At the hearing, both parents testified, as did the caseworkers for TDR and LL's cases. The court terminated Dembny-Reinke and Lozen's parental rights.[3]

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[2] Huron Undercover Narcotics Team.

[3] MCL 712A.19b(3)(g) and (j).

On appeal, Dembny-Reinke and Lozen argue that the evidence was insufficient to establish the statutory grounds for termination by clear and convincing evidence. We agree. Lozen argues that his incarceration alone should not have resulted in termination of his parental rights and that no evidence presented by DHS indicated that he was not capable of being a good parent. Dembny-Reinke argues that the evidence showed that she was conquering her addictions, as she had been clean and sober for a year. She was also visiting the child regularly, working, and living in adequate housing.

Termination of parental rights is appropriate where one or more statutory grounds for termination are proven by clear and convincing evidence.[4] This Court reviews the lower court's findings under a clearly erroneous standard.[5] In this case, the evidence was insufficient to satisfy the statutory grounds for termination of either Dembny-Reinke or Lozen's parental rights.[6] An incarcerated respondent who does not fit within certain exceptions[7] must be allowed to attend hearings and participate in services.[8] Without this rudimentary due process, the court is left with a "hole" in the evidence and cannot properly assess the respondent's capacity to parent.[9] The Court in *Mason* relied on *Rood* and MCL 712A.19a(2)'s statement that "[r]easonable efforts to reunify that child and family must be made in all cases."[10] Here, Dembny-Reinke and Lozen did not come within the "aggravated circumstances" enumerated MCL 712A.19a(2) and also did not fit within the additional circumstances listed in MCL 722.638(1). DHS and the court were thus required to involve Dembny-Reinke and Lozen in the proceedings. DHS was also required to prepare an initial service plan (ISP) within 30 days of removal,[11] which was January 27, 2011.

In this case, DHS prepared an ISP on February 27, 2011. DHS also attempted to withdraw its termination petition and replace it with a temporary custody petition, but the court would not authorize the amended petition. Seven hearings took place before Lozen was represented by counsel or allowed to participate, on June 23, 2011, at a hearing termed a status conference and pretrial. Thereafter, the termination hearing began on July 12, 2011, which essentially gave Lozen no time to participate in reunification services. The court's laudable aim was to "plow ahead" so the child could have permanency, but the result was trampling on the

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[4] *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000); *In re B & J*, 279 Mich App 12, 17; 756 NW2d 234 (2008).

[5] MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999).

[6] MCL 712A.19b(3)(g) and (j).

[7] MCL 712A.19a(2)(a).

[8] *In re Mason*, 486 Mich at 155-160.

[9] *In re Rood*, 483 Mich 73, 119, 127; 763 NW2d 587 (2009).

[10] *In re Mason*, 486 Mich at 152.

[11] MCL 712A.13a(9)(a).

parents' rights to try to rehabilitate sufficiently to be considered viable alternatives to raise the child.

It is true that Lozen was largely unavailable to participate in services because of his incarceration. Further, his actions in selling heroin were quite reprehensible. But there was simply no judicial determination that he had committed any of the crimes that would justify moving for immediate termination and dispensing with services. In prison, he was working two jobs, landscaping and painting, which would provide skills useful in the job market. He had completed Phase II substance abuse courses, and the court's finding that he did "nothing productive" was clearly erroneous. The trial court committed reversible error by moving so swiftly to termination without attempting to provide Lozen with services required by statute and *Mason*.[12]

In the trial court, DHS argued that *Mason* did not apply because the petition requested termination. In general, DHS is not obligated to provide reunification services when the goal is termination.[13] But in this case, DHS treated Dembny-Reinke differently by offering her a voluntary PAA and certain services even though the court-mandated goal was termination. In Lozen's case, the proceedings were particularly unfair. He did not have any legal right to participate until his paternity was established.[14] He was not a "father" as defined by the court rule.[15] Lozen, however, was thought to be the father sufficiently to include him as a putative father on the original petition. Even though he was the father of the couple's older child, DHS did not offer him a paternity test initially. Then there was a delay in getting the results and obtaining and filing an affidavit of filiation, which was filed on May 17, 2011. Like the father in *Mason*, Lozen anticipated being paroled in less than two years. In LL's case and in this case, Lozen was seen as having good parenting skills. But he did not have counsel appointed and was not present until the eighth hearing, which was approximately three weeks before the termination hearing began. After May 17, 2010, he was definitely entitled to participate and receive services under *Mason*.

Dembny-Reinke, too, should have been afforded the opportunity to formally participate in services. Under her voluntary agreement, she visited TDR regularly and displayed appropriate parenting skills. Her screens were negative and she took only prescribed medications. Whether she could be successfully weaned off Suboxone was an unknown future event. She appeared to be doing well, as she obtained a sponsor, went to NA and AA meetings regularly, and cared for LL on weekends. Dembny-Reinke also had a job. Even in the beginning, when she was in a treatment program, she visited TDR in the evenings. She had harmed the child by ingesting

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[12] See also *In re DMK*, 289 Mich App 246, 255-257; 796 NW2d 129 (2010).

[13] *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009).

[14] *In re LE*, 278 Mich App 1, 18-21; 747 NW2d 883 (2005).

[15] MCR 3.903(A)(7). See also MCR 3.903(A)(24), MCR 3.920, MCR 3.921(B) to (D), MCL 712A.18f, MCL 712A.19(7).

substances that caused him to suffer withdrawal symptoms, which can be considered evidence of neglect.[16] Much of the remaining evidence against Dembny-Reinke, however, came from LL's file, and some was not legally admissible. The doctrine of anticipatory neglect dictates that how a parent treats one child is probative of probable treatment of another child.[17] But evidence of neglect of a prior child is usually applied to satisfy requirements for jurisdiction, and not as the main or sole evidence to support termination,[18] as such evidence "is not conclusive or automatically determinative."[19]

In the present case, Dembny-Reinke did use heroin during her pregnancy with TDR, and later failed wean herself off of Subutex by Christmas, as Dr. Brendan Conboy thought she should. But these circumstances do not satisfy the "felony assault" or "severe physical abuse" requirements of the requisite statutes.[20] After TDR was born, Dembny-Reinke attended drug treatment, seemed to be doing well, and was trying hard to "kick" her drug habit. DHS was providing some services and had attempted to withdraw its request for termination. Further, DHS had not been able to sustain its burden on the best-interest issue in LL's case. Caseworkers' testimony and court reports showed that Dembny-Reinke could be an excellent parent if drugs and crime were out of the picture.

Accordingly, the court's findings in this case largely depended on findings in another case, which did not result in termination. In fact, the factual and legal allegations in the present petition were insufficient to support a termination petition against either parent. Then when both parents appeared to be improving and rehabilitating themselves, the court compounded the error by not permitting them to work toward reunification.

Dembny-Reinke and Lozen next argue that the court erred in taking judicial notice of LL's file and relying on exhibits entered in that file that contained legally inadmissible evidence. We agree, but find the error to be harmless. While discussion of this issue is unnecessary to our resolution of the case, we discuss it to provide guidance to the trial court.

The court shall order termination at an initial disposition where the original or amended petition contains a request for termination, the evidence shows grounds for jurisdiction, and "at the initial dispositional hearing, the court finds on the basis of clear and convincing, legally admissible evidence" of grounds for termination.[21] Here, much of the evidence from LL's file

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[16] *In re Baby X*, 97 Mich App 111, 116; 293 NW2d 736 (1980).

[17] *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001).

[18] See, e.g., *In re Foster*, 285 Mich App 630, 631-632; 776 NW2d 415 (2009); *In re Dittrick*, 80 Mich App 219, 222; 263 NW2d 37 (1977).

[19] *In re Kantola*, 139 Mich App 23, 28; 361 NW2d 20 (1984).

[20] MCL 712A.19a(2)(b); MCL 722.638(1).

[21] MCR 3.977(E).

would not have been "legally admissible" in LL's case but for the fact that DHS sought temporary, and not permanent, custody of LL. This includes caseworkers' reports, a psychiatrist's letter, psychological evaluations, substance abuse assessments and reports, and a police report concerning Lozen. In *DMK*, in similar circumstances, this Court noted that "[a]lthough certain police reports may qualify as admissible under MRE 803(8), the reports admitted here do not describe matters actually observed by an officer and are replete with multiple levels of inadmissible hearsay."[22] Lozen's father's statements to police describing his involvement in heroin sales would have been admissible as admissions by a party opponent and not hearsay.[23] The same can be said of Dembny-Reinke and Lozen's statements to caseworkers and service providers in LL's case. Testifying caseworkers' firsthand observations from LL's case were properly admitted. Less clear is the status of statements in substance abuse and mental health assessments made to persons in LL's case who were not subject to cross-examination in this case. This Court was not provided the transcripts or opinions in LL's case, and thus we do not know whether the authors of the reports testified. To show the statements legally admissible, DHS would first have to show that Dembny-Reinke and Lozen in fact made the statements.[24] Further, the medical treatment exception in MRE 803(4) requires that the statements be made for the purposes of, and reasonably necessary to, diagnosis and treatment.[25]

In the present case, the trial court failed to consider the fact that Dembny-Reinke and Lozen's rights to LL were not terminated, or the legally admissible evidence requirement, in its discussion of taking judicial notice of material in LL's file. The court quoted *In re Slis*, which states: "At a dispositional hearing, a probate court may apprise itself of all relevant circumstances and, in its discretion, may admit evidence of such circumstances or may consult the records of the original and all subsequent hearings on the custody of the child."[26] *Slis* and *Harmon*, however, considered the admissibility of records from earlier hearings in the same case, not a different child's case. Additionally, *LaFlure* and *Harmon* involved temporary custody petitions. The trial court failed to recognize these distinctions.

Here, admission of the challenged evidence, however, was harmless. Dembny-Reinke, Lozen and caseworker Melinda Herriman testified about much of the damaging evidence from LL's case. Thus, inadmissible hearsay in the reports from LL's case was largely cumulative. The admission of the hearsay likely did not affect the outcome, and reversal would not be required on this ground alone.

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[22] *In re DMK*, 289 Mich App at 259 n 6.

[23] MRE 801(d)(2).

[24] *Merrow v Bofferding*, 458 Mich 617, 626-627; 581 NW2d 696 (1998).

[25] *Id.* at 628-630.

[26] *In re Slis*, 144 Mich App 678, 687; 374 NW2d 788 (1985), quoting *In re Harmon*, 140 Mich App 479, 481; 364 NW2d 354 (1985). See also *In the Matter of LaFlure*, 48 Mich App 377, 390; 210 NW2d 482 (1973).

Next, Dembny-Reinke argues that the court erred in admitting evidence of her medical records. We disagree. Admission of evidence is generally reviewed for an abuse of discretion[27] although questions of law are reviewed de novo.[28] An abuse of discretion occurs when the court's decision falls outside the range of reasonable or principled outcomes.[29]

In the case at bar, the court did not abuse its discretion in admitting medical records. The court admitted TDR and Dembny-Reinke's medical records under MCL 333.16281 and MCL 722.631. MCL 333.16281 states that DHS may obtain records of suspected child abuse, and privileges do not apply to medical records obtained under this section. MCL 722.631 states that most privileges other than attorney-client and clergy-congregant are abrogated and "shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to this act." Our Supreme Court has held that MCL 722.631 does not require that child protective proceedings result from a report made by a required reporter, and that a report by a neighbor is also a "report" under the child protection law.[30] The Court construed the physician-patient privilege narrowly and the exception broadly, and found it in everyone's best interests for the fact finder to be apprised of all relevant information.[31] Additionally, this Court found that a court order is not required to produce records of the baby's withdrawal symptoms and the mother's drug abuse, as the patient's right to confidentiality gives way to the best interests of the child.[32]

In the instant case, Dembny-Reinke has cited no authority to use the physician-patient privilege to prevent disclosure of her and TDR's pertinent medical records. Drug abuse during pregnancy and the baby experiencing withdrawal symptoms were relevant to Dembny-Reinke's parental fitness, and the fact that the Subutex was prescribed did not go to the issue of abrogation of the privilege. Moreover, the caseworker testified that Dembny-Reinke had admitted using heroin during the first five months of pregnancy. Reversal is not warranted on the basis of this issue because the privilege was abrogated[33] and the medical records were cumulative to other evidence.

Finally, Dembny-Reinke and Lozen argue that the court's ruling that termination was in the best interests of the child was clearly erroneous. We agree. Once a statutory ground for termination is established by clear and convincing evidence, the trial court must terminate

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[27] *Hilgendorf v St. John Hosp and Med Ctr Corp*, 245 Mich App 670, 688; 630 NW2d 356 (2001).

[28] *In re LE*, 278 Mich App at 17.

[29] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

[30] *In re Brock*, 442 Mich 101, 117-119; 499 NW2d 752 (1993).

[31] *Id.*

[32] *In re Baby X*, 97 Mich App at 120-121.

[33] MCL 722.631; MCL 333.16281.

parental rights if termination is in the child's best interests.[34] The trial court's decision on the best-interest question is reviewed for clear error.[35]

The trial court clearly erred in finding clear and convincing evidence that termination of Dembny-Reinke and Lozen's parental rights was in the child's best interests. The issue of TDR's best interests is linked to statutory grounds. Because the petition improperly sought termination, Dembny-Reinke and Lozen were not permitted to work toward reunification, and the resulting "hole" in the evidence tainted the best-interest phase as well. Each time Dembny-Reinke and Lozen were assessed, they were found to have good parenting skills. They appeared to be making progress and to have their drug issues under control. Lozen will soon be released from prison and has useful job skills. Dembny-Reinke has a job and housing. She also has regular, unsupervised contact with LL, without interference from DHS. Before his incarceration, Lozen also enjoyed this right. It was premature to decide the best-interest issue without affording Dembny-Reinke and Lozen the opportunity to work toward reunification with TDR. As such, clear and convincing evidence did not support the court's ruling regarding TDR's best interests.[36]

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Peter D. O'Connell
/s/ Michael J. Talbot

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[34] MCR 3.977(H)(3); MCL 712A.19b(5).

[35] MCR 3.977(K); *In re Trejo*, 462 Mich 356-357.

[36] *Id.*