STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DIONTATE THOMAS PHIFER, JR., DAMION DARNELL PHIFER, DE'AARION MALACHI PHIFER, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KENDREA E. ZAMORA,

Respondent-Appellant,

and

DIONTATE THOMAS PHIFER,

Respondent.

UNPUBLISHED
December 13, 2007

No. 277429
Genesee Circuit Court
Family Division
LC No. 05-120122-NA

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

Respondent-Appellant Kendrea E. Zamora (respondent) appeals as of right from an order terminating her parental rights to the minor children under MCL 712A.19b(3)(g) and (j). We reverse and remand.

Respondent first argues that the ultimate termination decision was improperly delegated to a referee, contrary to MCL 712A.10(1) and MCR 3.913(A)(1). We disagree. Questions of statutory interpretation are reviewed de novo. *In re SR*, 229 Mich App 310, 314; 581 NW2d 291 (1998).

MCL 712A.10(1) authorizes a judge to designate a referee to hear testimony and prepare a report summarizing the testimony and to make a recommendation for the court's findings and disposition. But as this Court observed in *In re AMB*, 248 Mich App 144, 217; 640 NW2d 262 (2001), "neither the court rules nor any statute permits a hearing referee to enter an order for any purpose."

In this case, as in *In re AMB*, the judge's "signature on the order is plainly from a rubber stamp, not handwritten." *Id*. at 218. Unlike *In re AMB*, however, the referee did not refer to herself as the court or speak of her right to make a decision. Rather, she stated that she would "recommend to Judge Weiss" that respondent's parental rights be terminated, thereby indicating that she plainly understood that judge, not she, was making the ultimate decision in the case. Also unlike *In re AMB*, there are no record statements by the judge tending to indicate that he failed to review the referee's findings and recommendations until after the order was entered. Additionally, contrary to what respondent argues, the order of termination prepared by the referee contains a recommendation and also contains in ¶ 13 a brief summary of the testimony received at the hearing. Although the summary is terse and devoid of any balanced presentation of the evidence which might support a judicial choice to disagree with the referee,[1] respondent has not shown that the referee improperly exercised judicial authority in this case. Reversal is not required on this basis.

We agree with respondent, however, that the referee failed to advise her of her right to review by the trial court. MCR 3.913(C) states that "the referee *must inform* the parties of the right to file a request for review of the referee's recommended findings and conclusions as provided in MCR 3.991(B)." A written request for review must be filed within seven days after the hearing, or within seven days after the referee issues proposed findings and recommendations, whichever is later. MCR 3.991(B). "The judge must enter an order adopting the referee's recommendation unless . . . the judge would have reached a different result had he or she heard the case." MCR 3.991(E). The judge may adopt, deny, or modify the referee's recommendation, "on the basis of the record and the memorandums prepared, or may conduct a hearing." MCR 3.991(F). These procedures are mandatory. *In re AMB*, *supra* at 220.

In this case, while the referee mentioned that she was making a recommendation to the judge, she never advised respondent of her right to request judicial review, in clear violation of the court rule. Procedural errors can be considered harmless, unless they affect the fundamental fairness of the proceedings or contribute to the outcome. See *In re AMB*, *supra* at 235. For the reasons further discussed below, we believe there is a reasonable possibility that the judge may have reached a different result if respondent had requested review of the referee's proposed findings and recommendations. Regardless of whether the judge would have decided this case differently upon request for review, however, we conclude that reversal is required because the referee clearly erred in finding that the statutory grounds for termination were established by clear and convincing evidence.

When termination of parental rights is sought, the existence of a statutory ground for termination must be proven by clear and convincing evidence. MCR 3.977(F)(1)(b) and (G)(3); *In re Miller*, 433 Mich 331, 344-345; 445 NW2d 161 (1989). The trial court's findings of fact are reviewed for clear error. MCR 3.977(J); *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).

[1] Although the referee also rendered a decision from the bench containing a summary of the facts and a dispositional recommendation, the hearing was not transcribed until after the termination order was entered.

The trial court terminated respondent's parental rights under MCL 712A.19b(3)(g) and (j), which permit termination under the following circumstances:

> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.
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> * * *
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> (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.

With regard to § 19b(3)(g), the evidence showed that respondent did not yet have housing or employment, and that she was assaulted approximately a week before she completed domestic violence classes. In the past, she had resumed her relationship with the children's father despite prior incidents of domestic violence against her oldest child and the maternal grandmother. The children were removed from respondent's care because she allowed the father to move back in (or visit), and the father assaulted her. Thus, there was clear and convincing evidence that, without regard to intent, respondent failed to provide proper care.

However, the referee clearly erred in finding that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time. Although the initial petition was filed in August 2005, and the court assumed jurisdiction over the children in January 2006, petitioner did not provide respondent with a referral for domestic violence classes until October 6, 2006, five months after the children were removed from her care and less that two weeks before the termination hearing began. Although the court ordered respondent to participate in domestic violence classes in January 2006, she testified that she could not afford to pay for the YMCA classes, and the Protective Services worker assigned to this case until August 2006 never made a referral.

The children were removed from respondent's care in May 2006, and respondent signed a parent-agency agreement on June 12, 2006, that included domestic violence classes. Although termination was requested, visitation and services were continued. Yet no referral for domestic violence classes was made until October 6, 2006, when a new worker, Amber Tyler, was assigned to the case. Two weeks later, at the end of the first day of the termination hearing, Tyler asked for discretion to allow respondent to have unsupervised visitation. After the second hearing date, DHS worker Daniel Spalthoff asked the referee to hold the termination petition in abeyance to allow respondent to participate in services. Further, respondent was allowed to plan for reunification with her youngest child, Kaliyah. Thus, petitioner did not consider respondent incapable of providing proper care and custody, even at that time.

The referee relied heavily on the opinion of Walter Drwal, a psychologist who evaluated respondent. According to the referee, Drwal believed that respondent was very resistant to treatment. However, the record discloses that Drwal testified that respondent was amenable to treatment and would make progress if she expended the effort, but that she would initially be resistant to treatment. Drwal opined that respondent should be threatened with termination to

force her to participate in domestic violence classes and support groups, and to cut off all contact with the father. He added that if respondent did not respond after being clearly faced with the consequences of noncompliance, she was unlikely to respond at all. However, not having seen her recently, Drwal was unwilling to conclude that it was a waste of time to provide additional counseling. Further, Drwal's opinion did not change the fact that petitioner had a duty to make reasonable efforts to alleviate the conditions that brought the children into care, yet it allowed the case to fall through the cracks and did not make a referral for domestic violence classes until shortly before the termination hearing, ten months after the court assumed jurisdiction and more than a year after the initial petition was filed.

Further, while respondent should never have allowed the father to have contact with her or the children, the referee evidenced a disturbing belief that respondent should be able to overcome the cycle of domestic violence on her own, without any assistance. The referee relied on incidents that occurred before respondent was ever offered services to conclude that she simply did not "get it," and was never going to get it. Further, while respondent made a bad decision in attending a party that led to an assault on her on March 9, 2007, there was no evidence that this incident was related to domestic violence. Therefore, that incident did not support the referee's conclusion that respondent did not learn anything from the domestic violence classes.

Concerning housing, respondent offered evidence that she had found suitable housing, had been approved for financial assistance, and had already paid one month's rent. She had also resumed participation in the Work First program.

For these reasons, we conclude that the referee clearly erred in finding that termination was warranted under § 19b(3)(g).

With regard to § 19b(3)(j), the evidence showed that respondent resumed her relationship with the father after he broke the grandmother's arm, and again after the incident involving her oldest child. During the incident involving the grandmother, however, respondent was attempting to protect the child from the father. Respondent was not home during the second incident. Nonetheless, by resuming the relationship, she placed her children at risk of harm.

However, the question posed by § 19b(3)(j) is whether, at the time of the termination hearing, there was a reasonable likelihood that the children would be harmed if returned to the parent's care. During the termination hearing, while services were being provided, Tyler asked the court to allow unsupervised visitation and Spalthoff asked the court to hold the petition in abeyance. Further, respondent was allowed to plan for reunification with Kaliyah, the youngest child. It is apparent, therefore, that petitioner did not perceive a reasonable likelihood that the children would be harmed if placed in respondent's care. As noted, respondent was not provided with services until October 2006, and was never given a reasonable opportunity to demonstrate that she had benefited from domestic violence classes. We therefore conclude that the referee clearly erred in finding that there was clear and convincing evidence to support termination under § 19b(3)(j).

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

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Brian K. Zahra