STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
July 1, 2010

In the Matter of MEDLEY, Minors.

No. 294001
Jackson Circuit Court
Family Division
LC No. 01-005233-NA

ON RECONSIDERATION

Before: SAAD, P.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(g). We reverse and remand.

The trial court terminated respondent's parental rights after finding that clear and convincing evidence showed that respondent, without regard to intent, failed "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 child's age." MCL 712A.19b(3)(g). The specific rationale utilized by the trial court was:

> I think the only condition that existed at the time of the most recent adjudication with regard to Mr. Medley *was the fact that he was incarcerated and that he's been paroled and that is expected to end*. So I don't think that (3)(c) applies to him.
>
> The Court does find that pursuant to 19b(3)(g), there is clear and convincing evidence that that statutory basis has – that that burden of proof has been met by the Prosecuting Attorney for the following reasons: The Court heard testimony of the Department of Human Services worker and this is specifically with regard to him being able to provide proper care and custody within a reasonable time. And that particular portion of the statute also says that that's without regard to intent his failure to provide proper care or custody for the minor children.
>
> And he has certainly been unable to do so and I understand that it certainly wasn't obviously his choice to go to prison and not be able to provide proper care

and custody for these children since October of 2006, but the Court does find that it was certainly his actions that put him there and he's been able – been unable to provide proper care and custody for them.

And the Court also has to believe that there are no reasonable expectations that the parent will be able to provide proper care and custody within a reasonable time considering the age of the children. These children are three and five, soon to be four and six. *The respondent father is scheduled to be paroled next week.*

The testimony of both the DHS worker and the therapist, Ms. Snow, point to at the very minimum nine additional months before any reunification could begin to occur. And that certainly is the best case scenario. Ms. March testified that it isn't simply just a completion of services that leads her to reunify a parent with a child but certainly a maintenance of good behavior and continuation with services that – that lead her to believe that it is appropriate. And even if he were to – even if the services – even if the Court thought the services that were completed in prison adequately addressed the existing needs, the Court would certainly want to have several months to make sure that there would be no additional issues and no non-compliances with parole.

So we're looking at, at least another nine months, more likely another year or more before reunification would be available to the children and to Mr. Medley with the children. And I think considering their ages and the amount of time they've already been out of care, which is sixteen months, that just isn't reasonable to keep them in limbo and to keep their permanence up in the air.

The Court also considered pursuant to (3)(g) the testimony of Ms. Snow, that she doesn't believe in her work with the children and her observations with them for the past year that the children would be ready. Furthermore, she testified that the services that were completed in prison he certainly has completed. I don't want to take away that he's completed them successfully, but those are specific to being released from prison and successfully moving amongst people in the community and not committing crimes. *Those particular programs were not geared towards parenting*, which is a whole different set of – of issues. parenting versus just controlling anger and not committing additional crimes once an individual is paroled.

Cage the Rage is not a batterer's intervention program, which the recommendation is minimum of twenty six weeks. And this Court doesn't believe the service in prison. although successfully completed, I don't think they adequately addressed the batterer issue or some of the parenting issues that would take time to be resolved prior to any reunification.

* * *

It would take a significant period of time to make a safe, healthy transition with these children, assuming that there are no setbacks with parole or substance abuse or domestic violence. And the Court will note for the Record that I do

> think that setbacks are likely in this situation. I think that's the – the AA and NA attendance certainly has helped but there was actually no substance abuse treatment. And the Court maintains concerns about the relationship between Mr. Medley and Ms. Dhaem, that some of those old patterns could potentially repeat themselves since the contact has been renewed. [Emphasis added.]

In our first opinion, we held that the trial court did not clearly err in finding that the statutory ground for termination was established by clear and convincing evidence. The basis for our conclusion was that the children were removed from their parents' custody two times, first in 2006 and again in March 2008. Respondent was unavailable to care for the children most of this time because of his incarceration,[1] and the children's mother was not a suitable caregiver because of domestic violence and substance abuse. Although respondent was scheduled to be paroled from prison in the week following the termination hearing, the evidence showed that because of his criminal history and past problems with substance abuse and domestic violence, he would require extensive services before reunification could even be considered. According to the children's therapist, respondent would require at least two to three years of commitment to treatment to be able to demonstrate that he could provide a safe and secure home for the children. In addition, the children had been severely traumatized by their past experiences with respondent, and they too would require substantial additional treatment before they would be emotionally ready to be reunited with respondent. We also concluded that the evidence supported the finding that termination was in the children's best interests.

However, just after release of our opinion, and while respondent's motion for reconsideration was pending, our Supreme Court decided *In re Mason Minors*, __ Mich __; __ NW2d __ (2010) (Docket No. 139795, decided May 26, 2010) (opinion by CORRIGAN, J.), a case that has facts quite similar to the instant one. In that case the Court reversed the termination of an incarcerated respondent's parental rights that had been terminated under MCL 712A.19b(3)(c), (i), (g), (h), and (j). As in the case before us, the respondent in that case testified at the termination hearing[2] that his release from prison was imminent, that he had employment and housing available upon his release, and that he had completed several programs while in prison. *Id*. at ___, slip op at 6-7. Despite this, the DHS worker had no knowledge of respondent's progress, and testified that even with those accomplishments, it would take respondent six months to comply with the service plan and parole conditions. *Id*. The trial court terminated his rights, and our Court affirmed. Respondent was released one week after this Court's decision. *Id*. at ___, slip op at 7 n 2.

On appeal, the Supreme Court first held that because respondent was not offered an opportunity to participate by phone in each of the separate phases[3] of the termination proceeding,

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[1] Respondent was incarcerated in October 2006 for his conviction of third-degree home invasion.

[2] The respondent in that case was not allowed to participate in any hearings for almost 16 months, until the permanent planning hearing and subsequent termination trial. *In re Mason Minors*, ___ Mich at ___, slip op at 9. That is not the situation in the case before us today.

[3] As the *In re Mason Minors* Court held:

(continued…)

his right to be offered a chance to participate under MCR 2.004 was violated, which in turn caused in part the trial court's findings to be clearly erroneous. *Id*. at ___, slip op at 11-12. The Court then turned its focus on the failure of DHS and the trial court to offer respondent any services, or to update the case service plan. *Id*. at ___, slip op at 11-14. The Court, citing MCL 712A.13a(8)(a), MCL 712A.18f(3)(d) and (5), MCL 712A.19(6)(a) and (c) and (7)(a) and (b), held that the DHS had an obligation to prepare a case service plan for respondent, and to update it if necessary given his incarceration. *Id*. DHS had failed to do so even after concluding that the mother had failed to comply with her plan, leaving respondent as the only remaining parent. Because it failed to provide respondent with such an updated plan or to otherwise contact him, the Court held that the trial court committed clear error in terminating his rights in part for not complying with a plan that he was never given a chance to comply with. *Id*., at ___, slip op at 15-16.

As in *In re Mason Minors*, the trial court's findings in this case were clearly erroneous. Except for the fact that respondent was able to participate in these proceedings by phone or in person, respondent's case was on the same footing as that found in *In re Mason Minors*. For example, none of the DHS workers assigned to this case ever spoke with respondent until the day of the termination trial, and thus never offered him any services–either directly or through a Department of Corrections staff member. Yet, respondent was found by the court not to be prepared on release from prison to care for the children. How could he without any service to correct his problems? See MCL 712A.19a(6) and *In re Mason Minors*, ___ Mich at ___, slip op at 14-15. More importantly, the failure to communicate with respondent means that "the court and the DHS failed to consider that respondent had *never* been evaluated as a future placement or provided with services." *Id*. at ___, slip op at 15 (emphasis in original). The *Mason* Court's conclusion is equally applicable here:

> Rather, the DHS had focused on its attempts to reunify the children with Smith and, in doing so, *disregarded respondent's statutory right to be provided services and, as a result, extended the time it would take him to comply with the service plan upon his release from prison–which was potentially imminent at the time of the termination hearing. The state failed to involve or evaluate respondent, but then terminated his rights, in part because of his failure to comply*

(…continued)

> A child protective action such as this consists of a series of proceedings, including a preliminary hearing at which the court may authorize a petition for removal of a child from his home, MCL 712A.13a(2), review hearings to evaluate the child's and parents' progress, MCL 712A.19, permanency planning hearings, MCL 712A.19a, and, in some instances, a termination hearing, MCL 712A.19b. Each proceeding generally involves different issues and decisions by the court. Thus, to comply with MCR 2.004, the moving party and the court must offer the parent "the opportunity to participate in" each proceeding in a child protective action. For this reason, participation through "a telephone call" during one proceeding will not suffice to allow the court to enter an order at another proceeding for which the parent was not offered the opportunity to participate." [*Id*. at ___, slip op at 10 (footnote omitted).]

> *with the service plan while giving him no opportunity to comply in the future*. This constituted clear error. As we observed in *In re Rood*, a court may not terminate parental rights on the basis of "circumstances and missing information directly attributable to respondent's lack of meaningful prior participation." *In re Rood*, 483 Mich 73, 119; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.); see also *id*. at 127 (YOUNG, J., concurring in part) (stating that, as a result of the respondent's inability to participate, "there is a 'hole' in the evidence on which the trial court based its termination decision). [*Id*. at ___, slip op at pp 15-16 (emphasis added; footnote omitted).]

Despite not being contacted by DHS, respondent voluntarily and successfully completed many courses while in prison, continued his written contact with the children (the only type of contact allowed by the court), *In re Mason Minors*, ___ Mich at ___, slip op at 19, and the children were with a family placement (a maternal aunt). Just as importantly, respondent testified that he had employment and housing available when he was paroled, and was to be paroled within a week of the termination trial. See *Id*. at ___, slip op at 18-19.[4] And, respondent was paroled just nine days after the trial court's opinion and order.[5] Thus, on reconsideration, we hold that the trial court clearly erred in finding grounds for termination under MCL 712A.3(g).

Respondent also argues that the trial court erred in finding that termination of his parental rights was in the children's best interests. Given our conclusion above, we need not address this issue.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

[4] Although at this point in its opinion the *Mason* Court was discussing the evidence under MCL 712A.19b(h), the Court later noted that the same analysis applied under MCL 712A.19b(g). *In re Mason Minors*, ___ Mich at ___, slip op at 21.

[5] Interestingly, a DHS worker testified at trial that she expected respondent to be paroled in the next nine days and that at that time she would have considered providing respondent services. And, she also testified that if respondent completed the services, she would expect the children to be returned to respondent within nine months.