STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
August 12, 2010

In the Matter of L. T. MANCIEL, II, Minor.

No. 296359
Wayne Circuit Court
Family Division
LC No. 02-412296

Before: GLEICHER, P.J., and ZAHRA and K.F. KELLY, JJ.

PER CURIAM.

Respondent Larry Darnell Manciel, the involved minor child's father, appeals as of right from a circuit court order terminating his parental rights pursuant to MCL 712A.19b(3)(g) and (j). Respondent challenges as inadequate the level of parental services afforded or offered by petitioner Department of Human Services (DHS). We reverse and remand for further proceedings.

Respondent fathered the minor child with SS, who had given birth to nine previous children; SS lost her parental rights to eight of the previous children. This child protective proceeding commenced in October 2009, shortly after the instant child's birth. The DHS filed a petition seeking termination of SS's and respondent's parental rights. Most of the petition allegations centered on SS, the prior terminations of her parental rights, her history of drug abuse, and her neglect to avail herself of prenatal care. According to the petition, the instant minor "tested positive for cocaine at the time of [his] delivery" and required antibiotic treatments related to SS's syphilitic condition. With respect to respondent, the petition noted that he had "failed to assist the mother in obtaining prenatal care or drug treatment," despite respondent's "aware[ness] of the mother's drug history as well as the mother not having her children in her care prior to her pregnancy with [the minor]," and that respondent had "an extensive criminal record." A referee authorized the petition in mid-October 2009.

Respondent appeared at a preliminary hearing on October 14, 2009 and a November 10, 2009 pretrial hearing. Before the November 10, 2009 hearing, respondent had signed an affidavit of parentage, which entitled him to commence parenting time with the child. Although respondent made no appearance on the record at another brief pretrial hearing on December 7, 2009, he had accompanied his counsel to the courthouse and checked in with the court clerk. At the January 2010 termination hearing, the circuit court made the following observations:

> . . . [Respondent] is the legal father of [the instant minor]. [Respondent] did participate in perpetrating a fraud on the hospital by signing an Affidavit

> claiming that the mother's name was something other than the name that we later found it to be. He also knew that the mother had a drug problem and knew that she was pregnant and continued to use drugs while she was pregnant with his child. [Respondent] has an extensive criminal history that has been admitted on this record. The criminal history involved at least . . . six felony convictions involving violence, and he had been to prison multiple times. He committed a felony while he was on prole [sic] from prison. It was noted in his criminal history that he has a history [of] mental health issues. . . .
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> The Court would also note that [respondent], like the mother, has only appeared once in court proceedings to date. He is not present to put forth any case today with respect to this petition. . . . I would note also that [respondent] does not have a suitable home for his child. [Respondent] . . . is involved on a regular basis and substantial basis with the mother. A return of the child to the father, in the Court's opinion, because of his regular and substantial contact with the mother, who has been adjudicated a number of time[s] as an unfit parent, is essentially tantamount to returning the child to the mother if we return the child to [respondent]. The Court is also very concerned with the fact that [respondent] doesn't seem to, in the Court's opinion, have a clear, visible financial plan for the care of the child.

The court deemed termination of respondent's parental rights appropriate under MCL 712A.19b(3)(g) and (j).

The DHS did not offer respondent a case service plan, also referred to as a parent-agency agreement, which consists of services designed to facilitate parent-child reunification. See MCL 712A.13a(8); 712A.18f(2), (3). Several of the concerns about respondent that the court listed at the termination hearing, like his "extensive" criminal history, lack of suitable housing, potential mental health issues, and relationship with SS, constitute proper potential grounds for terminating his rights to the child. But the termination of respondent's parental rights qualified as premature because respondent father had no opportunity to participate in services, as mandated by statute.

"'Reasonable efforts to reunify the child and family must be made in *all* cases' except those involving aggravated circumstances not present in this case. MCL 712A.19a(2)." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (emphasis in original). "Before the court enters an order of disposition in a proceeding under section 2(b) of this chapter, the agency shall prepare a case service plan," which "shall include" a "[s]chedule of services to be provided to the parent, [and] child . . . to facilitate the child's return to his or her home or to facilitate the child's permanent placement." MCL 712A.18f(2), (3)(d). And generally, the court must hold review hearings where it "shall review on the record" "[t]he extent to which the parent complied with each provision of the case service plan, prior court orders, and an agreement between the parent and the agency." MCL 712A.19(6)(c). The only statutorily authorized exceptions to the general DHS responsibility to offer a parent services encompass the following:

> Reasonable efforts to reunify the child and family must be made in all cases except if any of the following apply:

(a) There is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in section 18(1) and (2) of the child protection law, 1975 PA 238, MCL 722.638.[1]

(b) The parent has been convicted of 1 or more of the following:

(i) Murder of another child of the parent.

(ii) Voluntary manslaughter of another child of the parent.

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[1] The relevant subsections of MCL 722.638 envision as follows:

(1) The department shall submit a petition for authorization by the court under . . . MCL 712A.2, if 1 or more of the following apply:

(a) The department determines that a parent . . . has abused the child or a sibling of the child and the abuse included 1 or more of the following:

(i) Abandonment of a young child.

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

(iii) Battering, torture, or other severe physical abuse.

(iv) Loss or serious impairment of an organ or limb.

(v) Life threatening injury.

(vi) Murder or attempted murder.

(b) The department determines that there is risk of harm to the child and either of the following is true:

(i) The parent's rights to another child were terminated as a result of proceedings under . . . MCL 712A.2, or a similar law of another state.

(ii) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under . . . MCL 712A.2, or a similar law of another state.

(2) In a petition submitted as required by subsection (1), if a parent is a suspected perpetrator or is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the family independence agency shall include a request for termination of parental rights at the initial dispositional hearing as authorized under . . . MCL 712A.19b.

(iii) Aiding or abetting in the murder of another child of the parent or voluntary manslaughter of another child of the parent, the attempted murder of the child or another child of the parent, or the conspiracy or solicitation to commit the murder of the child or another child of the parent.

(iv) A felony assault that results in serious bodily injury to the child or another child of the parent.

(c) The parent has had rights to the child's siblings involuntarily terminated. [MCL 712A.19a(2).]

The instant record simply does not substantiate that any of the statutory exceptions in MCL 712A.19a(2) or 722.638 exist in this case with regard to respondent.

Absent any efforts by the DHS to adhere to its statutory mandate concerning parental service provision, or any circuit court efforts to hold the DHS to its statutory responsibilities, the present termination of respondent's parental rights is unsustainable. As our Supreme Court summarized in *In re Mason*, "Here, because the DHS and the court failed to adhere to court rules and statutes, respondent was not afforded a meaningful and adequate opportunity to participate. Therefore, termination of his parental rights was premature." 486 Mich at 152. The Supreme Court further elaborated, in analysis controlling our instant decision:

> . . . [N]either [the DHS] nor the court ever facilitated respondent's access to services and agencies or discussed updating the plan. [*Id*. at 157.]
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> . . . [T]he court and the DHS failed to consider that respondent had *never* been evaluated as a future placement or provided with services. Rather, the DHS had focused on its attempts to reunify the children with [their mother] 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 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"). [486 Mich at 159-160 (emphasis in original, footnote omitted).]

None of the DHS arguments in favor of sustaining the termination in this case distinguish it from *In re Mason*, 486 Mich 142. For example, the DHS's suggestion that respondent's

criminal history weighs in favor of termination ignores the *Mason* observation that "a criminal history alone does not justify termination." *Id*. at 165.[2] The respondent in *Mason* also knew "that the children's mother was drinking again" and "did nothing to try to protect the children from the precarious situation in which this placed his children." *Id*. at 171 (MARKMAN, J., dissenting). Therefore, the primary rationales of the DHS and the circuit court do not justify the termination of respondent's parental rights without any effort at providing him services.[3]

The DHS failure to substantiate any statutory ground excusing its neglect to offer respondent services constrains us to reverse the order terminating respondent's parental rights and remand for the DHS to fulfill its statutory obligations concerning respondent.

Respondent additionally complains that he was deprived of his due process rights when the termination hearing proceeded in his absence. Neither respondent nor his counsel, who appeared at the termination hearing, objected in the circuit court on due process grounds. We thus limit our consideration of this unpreserved constitutional contention to whether plain error affected respondent's substantial rights. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009). In an affidavit attached to respondent's appellate brief, he concedes that he "was served with notice to appear for [the termination hearing] . . . on January 28, 2010." Respondent explains that he missed the hearing because when he and SS arrived at the hearing location on January 28, 2010, he dropped SS off and parked the car, and, as respondent "entered the building, [SS] told [him] that . . . [she] was told by the clerk that the case would be heard in the afternoon due to overcrowding." However, when respondent "returned in the afternoon, [he] was informed that the case had been called in the morning." The facts averred respondent's affidavit do not demonstrate any plain error in the form of a cognizable due process violation by *the court or the DHS*, especially in light of his concession that he received notice of the termination hearing and had representation by counsel at the hearing. See *Christensen v Michigan State Youth Soccer Ass'n*, 218 Mich App 37, 41-42; 553 NW2d 638 (1996) (emphasizing that due process protections apply to actions taken by governmental actors and public entities).

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[2] Notably, the respondent in *In re Mason* had prior convictions of criminal sexual conduct and failing to report as a registered sex offender. *Id*. at 172 (MARKMAN, J., dissenting). Here, the DHS did not specifically reference in the petition for termination what crimes comprised respondent's criminal record. At the outset of the termination hearing, counsel for the DHS proffered to the court "a packet of criminal records" "includ[ing] . . . an assault charge in 2002," "a larceny charge that's a [1998] case," and "an unarmed robbery case." No indication of record exists that respondent's crimes fell within the scope of MCL 712A.19a(2) or MCL 722.638.

[3] The only service of record that the DHS offered respondent was weekly supervised parenting times. Respondent's parenting times apparently commenced at some point after respondent signed the affidavit of parentage presented to the circuit court in November 2009. The DHS worker who supervised the parenting times testified at the termination hearing that respondent appropriately "held the baby, . . . [and] would talk to him."

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

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly