STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
January 22, 2015

In re J. S. SESSIONS, Minor.

No. 322460
Livingston Circuit Court
Family Division
LC No. 2014-014713-NA

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

The circuit court terminated the respondent-mother's parental rights at the initial disposition and without providing reunification services based on the fact that she had voluntarily relinquished her rights to one child and had her rights involuntarily terminated to another, her long history of criminality and substance abuse, and her current lengthy prison term.[1] Respondent raises constitutional challenges as well as attacking the grounds for termination and the circuit court's best-interest analysis. While we discern no constitutional error or evidentiary "hole" in the record, the circuit court did not adequately or accurately address the effect of the child's relative placement. Consequently, we affirm the circuit court's findings in relation to the grounds for termination, but because the court failed to address on the record critical considerations to the best-interest analysis, we vacate the termination and remand for further proceedings.

I. BACKGROUND

Respondent gave birth to the subject child, JS, while in jail after pleading guilty to charges of operating a methamphetamine lab. She will remain in prison until at least 2026.[2] The child's father was also incarcerated for larceny and destruction of property and will be in prison

[1] The court also terminated the parental rights of the child's father, but he has not appealed that ruling.

[2] This Court denied respondent's application for leave to appeal her current plea-based conviction. *People v Dennis*, unpublished order of the Court of Appeals, entered September 5, 2014 (Docket No. 322737). Her leave application is pending in the Michigan Supreme Court at this time. (Docket No. 150329.)

until at least 2018. Before JS's birth, respondent and her husband arranged for a paternal aunt to take custody of the child. Neither parent took steps to establish a legal guardianship, presumably because the Department of Human Services (DHS) took JS into care immediately after her birth. The DHS placed JS with the paternal aunt at the parents' request, however.

Within four days of JS's birth, the DHS filed a petition to officially take the child into custody.[3] The petition alleged that respondent told a Child Protective Services (CPS) investigator of her history of methamphetamine abuse and "reported that methamphetamine abuse was a factor in the termination of her rights to her son [RK] in 2004." The petition continued that respondent "has a history with CPS dating back to 2004" when she abandoned RK with his grandparents without making legal arrangements for them to care for the child. The court involuntarily terminated respondent's rights to RK for physical neglect. The petition further recited that the parents' incarceration left JS "without appropriate legal care or custody." The circuit court found probable cause for a custodial placement. The court did NOT take jurisdiction over the child at that time.

Initially, the court ordered the DHS to make reasonable efforts toward reunification but suspended parenting time due to the parents' incarceration. Within six weeks of the child's birth, however, the DHS filed a petition to terminate respondent's parental rights at the initial disposition. The petition cited respondent's long criminal history, beginning with juvenile offenses committed as early as 1985. These offenses included theft, prostitution, domestic violence, and alcohol and controlled substance related crimes. The termination petition reiterated the circumstances surrounding the termination of respondent's parental rights to RK and her more recent offenses resulting in her current incarceration. The circuit court agreed that reasonable efforts toward reunification were not required because "there's aggravated circumstances through the prior termination."

The court conducted a combined adjudication trial and termination hearing on May 16, 2014. Respondent testified regarding her lengthy criminal history, riddled with theft and forgery offenses committed to gather money for illegal drugs. Respondent admitted that she was arrested in 1996 on child abuse charges and relinquished custody to her oldest child, CJ, at that time. CJ originally remained with his biological father (who was also later charged with child abuse), but was eventually taken into court jurisdiction in another state and was placed with his paternal grandmother. Respondent claimed that she "signed off" on her rights to RK as well because she relapsed into drug abuse, but the evidence supports that her rights were involuntarily

[3] Respondent informed the case worker that JS may be eligible for membership in the Cherokee tribe. Workers indicated several times on the record that they were investigating this claim. There is no record indication that anyone determined that the infant is not an Indian child and the circuit court did not proceed under the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. On remand, we direct the circuit court to definitively resolve this issue on the record.

terminated.[4] Respondent further testified that she had 10 other pregnancies end in miscarriages, some of which were caused by drug abuse.

In relation to her current incarceration, respondent claimed that she had not manufactured methamphetamine and only pleaded guilty to that charge "[b]ecause [she] wasn't on [her] medication." Respondent conceded that her earliest release date was 2026 but asserted that "[i]n about another month my whole life is gonna change" because she was filing an application for leave to appeal to "pull[] [her] plea back." After that appeal, respondent contended, her maximum sentence would be only eight years. Respondent claimed that almost every fact in her presentencing investigation report was false. She also denied contriving a jailhouse escape scheme in which she planned to use red Kool-Aid to fake a miscarriage, although a probation officer testified that respondent conceded this plot to her.

Respondent stated that she required psychotropic medication because she had been diagnosed with schizophrenia and manic depression in 2005 at a Traverse City "forensic center." Respondent claimed that her therapist at Women's Huron Valley recently reiterated her diagnoses. The paperwork respondent herself provided at the hearing, however, contradicted her testimony and indicated she suffered from chronic depression, postpartum depression, post traumatic stress disorder, and suicidal ideations. Upon questioning by her counsel, respondent indicated that she felt her testimony was "influenced . . . by [her] mental illness" "[a] little bit."

Respondent also admitted to a lengthy history of substance abuse. She claimed that she first began using cocaine and alcohol at the age of eight. The probation officer who prepared respondent's presentence investigation report in her criminal matter testified that respondent reported using marijuana at the age of 12 and heroin as well from the age of 17.

HD, the paternal aunt caring for JS, testified at the combination hearing/trial. HD asserted that the child's father asked her in June 2013, if she and her husband would take custody of the child if respondent went to term. HD agreed, knowing that both parents would be incarcerated for lengthy periods. HD testified that "hopefully" JS would remain in her custody even after the father's release from prison because his older children "feel abandoned" by him. HD further stated that she and her husband were willing to adopt JS.

Following the trial/hearing, the hearing referee filed written findings of fact and conclusions of law and recommended termination of parental rights based on MCL 712A.19b(3)(*l*) ("The parent's rights to another child were terminated as a result of proceedings under [MCL 712A.2(b)] or a similar law of another state."), (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 child's age."), and (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

[4] Respondent appealed the termination of her parental rights to RK, but stipulated to the dismissal of her appellate claim. *In re Klein, Minor*, unpublished order of the Court of Appeals, entered November 18, 2005 (Docket No. 265138).

the parent."). The circuit court agreed with the recommendation and terminated respondent's parental rights on June 10, 2014.

II. REUNIFICATION EFFORTS

Respondent challenges the circuit court's determination that reasonable efforts toward reunification were not required in this case. Pursuant to MCL 712A.19a(2):

> The court shall conduct a permanency planning hearing within 30 days after there is a judicial determination that reasonable efforts to reunite the child and family are not required. 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 [MCL 722.638(1) and (2)].[5]
>
> (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.
>
> (*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.
>
> (d) The parent is required by court order to register under the sex offenders registration act.

The court's decision that reasonable efforts were not required in this case was based solely on the involuntary termination of respondent's parental rights to RK. MCL 712A.19a(2)(c).

Respondent contends that the denial of reasonable efforts was unconstitutional because it was grounded on a presumption of parental unfitness based solely on a prior termination. She relies on *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014), in which the Supreme Court found unconstitutional the "one parent doctrine," which allowed a court to proceed on a presumption of parental unfitness against both parents when only one parent entered a

[5] These provisions relate to conditions of serious child abuse.

jurisdictional plea or was found unfit following an adjudicatory trial.[6] In rendering its decision, the Court cited sage words from *Stanley v Illinois*:

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.
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> * * *
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> . . . The State's interest in caring for Stanley's children is de minimis if Stanley is shown to be a fit father. [It] insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family. [*Sanders*, 495 Mich at 412, quoting *Stanley v Illinois*, 405 US 645, 656-658; 92 S Ct 1208; 31 L Ed 2d 599 (1982).]

We do not discern the same constitutional dangers in connection with MCL 712A.19a(2). "Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Sanders*, 495 Mich at 404. Unlike with the one parent doctrine, MCL 712A.19a(2) contains a presumption based on the parent's *own* past conduct that reasonable efforts toward reunification are not required. And only the most severe conduct permits such a presumption.

In considering the constitutionality of MCL 712A.19a(2)(c), we find instructive the analogous analysis in *In re JL*, 483 Mich 300; 770 NW2d 853 (2009). In *JL*, the circuit court was required to proceed toward termination under the more stringent requirements of the ICWA because the subject child was an Indian child. *Id.* at 317. The respondent-mother in *JL* had been provided DHS services to maintain custody of her four children since the birth of her first. *Id.* at 305. Despite these services, the respondent exhibited a continued inability to safely care for her children. *Id.* at 307-308. A tribal court therefore terminated the respondent's parental rights to her three younger children. *Id.* at 308. The court retained respondent's parental rights to JL and

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[6] In this vein, the Court asserted:

> Dispositional hearings simply do not serve this same function. At the dispositional phase, the court is concerned only with what services and requirements will be in the best interests of the children. There is no presumption of fitness in favor of the unadjudicated parent. See MCL 712A.18f. The procedures afforded parents during the dispositional phase are not related to the allegations of unfitness because the question a court is answering at a dispositional hearing *assumes a previous finding of parental unfitness*. [*Sanders*, 495 Mich at 418 (emphasis added).]

allowed her unsupervised parenting time. *Id.* Subsequent events caused the DHS to also pursue termination in relation to JL. Based on the termination of respondent's parental rights after the provision of reunification services, the DHS sought immediate termination without additional efforts. *Id.* at 308-309.

Under the ICWA, the DHS must provide "active efforts" to maintain or reunify a family. "Active" efforts may not be undertaken "passive[ly]"; the DHS must do more than require a parent to take certain actions, it must actively assist the parent accomplish those goals. *Id.* at 321, quoting *In re Roe*, 281 Mich App 88, 107; 764 NW2d 789 (2008). The Supreme Court held that active efforts need not be "current," however. *Id.* at 324. In *JL*, active efforts at reunification had been provided over several years and the respondent failed to benefit. Those services were relevant to determining in the subject termination proceeding whether the child would be in danger of harm if returned to his mother's care and custody. *Id.* at 324-325. The Supreme Court also

> decline[d] to hold that active efforts must always have been provided in relation to the child who is the subject of the current termination proceeding. . . . [T]he question is whether the efforts made and the services provided in connection with the parent's other children are relevant to the parent's current situation and abilities so that they permit a current assessment of parental fitness as it pertains to the child who is the subject of the current proceeding. [*Id.* at 325.]

While the Supreme Court "decline[d] to adopt a futility test," it did conclude that even under the strictures of the ICWA, the DHS is not required to provide "endless active efforts" and may reach a point where it "pursue[s] termination without providing additional services." *Id.* at 326-327.

So too here, we find no constitutional violation. Respondent has been provided services in the past. Despite those services, she has never participated in treatment outside of incarceration for her severe psychological conditions. Respondent has continued to abuse substances and engaged in felonious activity to secure those substances even though rehabilitative services have been provided to her. Respondent even maintained, or allowed someone else to maintain, a methamphetamine laboratory in the home where the subject child would have been raised. Just as the DHS is not required to provide endless active efforts under the ICWA before seeking termination of parental rights, the DHS is not required to provide endless reasonable efforts under Michigan's child protective laws.

Moreover, the absence of current services geared toward reunification does not leave an evidentiary hold precluding termination. In this regard, respondent relies on *In re Rood*, 483 Mich 73; 763 NW2d 587 (2009), and *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).

In *Rood*, the circuit court failed to consistently notify the noncustodial parent of events in the child protective proceedings and never included him in services or a reunification plan. As the court never evaluated respondent's ability to care for the child, the Supreme Court determined that the circuit court prematurely concluded that the child would be harmed if placed in the respondent's care and custody. *Rood*, 483 Mich at 117-118.

In *Mason*, 486 Mich at 147, the respondent was a noncustodial parent who left his children in their mother's care while he was incarcerated. The circuit court excluded the respondent from several hearings and failed to notify him of his right to participate by telephone. *Id.* at 148. Despite his inability to participate in the proceedings for 16 months, the respondent secured his own services in prison. *Id.* at 148-149. The Supreme Court held that the DHS and circuit court cannot exclude a parent from consideration simply because he is incarcerated. *Id.* at 152. Absent "a meaningful and adequate opportunity to participate" in that case, termination was premature. *Id.*

Here, the DHS and the lower court recognized and honored respondent's right to participate throughout these proceedings despite her incarceration. No one precluded respondent's participation. Rather, based on existing aggravated circumstances, the DHS and circuit court determined that respondent was not entitled to a new round of reunification services. This did not leave a gap in the evidentiary record; respondent's past inability to remedy the conditions leading to the removal of RK from her care was a fact of record, as were the current circumstances leading to state intervention.

Respondent does not otherwise challenge the factual support for any ground supporting termination. We note, however, that MCL 712A.19b(3)(*l*) requires only a finding that the parent's rights had been involuntarily terminated to another child in the past. The record evidence clearly supports that respondent's parental rights to RK were involuntarily terminated. Termination need be grounded on one statutory factor alone. MCL 712A.19b(3); *In re Frey,* 297 Mich App 242, 244; 824 NW2d 569 (2012). Accordingly, respondent can establish no error in this regard.

III. RELATIVE PLACEMENT

Respondent also challenges the circuit court's decision to take jurisdiction over the child and then terminate her parental rights given that she provided proper care and custody by arranging for placement of the child with a paternal aunt. We agree that remand is necessary to reconsider this issue.

Termination of parental rights to a child requires a finding of at least one statutory basis for termination *and* a finding that termination of parental rights is in the child's best interests. MCL 712a.19b(5); MCR 3.977(E)(4); *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). A child's placement with relatives must be considered when determining the best interests of the child, and although such placement is not absolutely preclusive of termination, it weighs against it. *Olive/Metts*, 297 Mich App at 43. "A trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal." *Id*., citing *In re Mason*, 486 Mich 142, 163-165; 782 NW2d 747 (2010), and *In re Mays*, 490 Mich 993, 994; 807 NW2d 307 (2012).

The Supreme Court reiterated the importance of considering a parent's placement of his or her child with relatives in *Sanders*. In *Sanders*, the petitioner attempted to argue that the respondent-father's challenge to taking jurisdiction over his children was rendered moot by his incarceration. *Sanders*, 495 Mich at 420. The Supreme Court rejected the mootness argument:

> An incarcerated parent can exercise the constitutional right to direct the care of his or her children while incarcerated, and [the respondent-father] has tried to do just that. *For example, an incarcerated parent can choose who will care for his children while he is imprisoned.* At several times during the proceedings below, [the respondent-father] requested that the children be placed with his mother, the children's parental grandmother. *As long as the children are provided adequate care, state interference with such decisions is not warranted.* As a result, [the respondent-father's] complaint is not moot. [*Sanders*, 495 Mich at 420-421 (emphasis added, citation omitted).]

Here, respondent and her husband's decision to place the child with a paternal aunt was investigated at the combination adjudicatory trial/termination hearing. Both parents testified that within a month of conceiving the child, they were both incarcerated and realized that they would face lengthy prison terms. As a result, they requested that the husband's sister and her husband take custody of the child immediately following the birth. The aunt, HD, testified at the trial/hearing and corroborated that she spoke to her brother but not respondent about this request. The DHS interfered with the child's care and custody by filing a removal petition but honored the parents' wishes by immediately placing the child with HD. There is no contention that HD failed to provide adequate care and custody for the child.

We find it irrelevant that respondent did not approach HD and personally ask her to care for JS. Both respondent and the child's father testified that they discussed the issue and decided that HD would be a proper custodian. The child's father then approached HD because he was then out on bond and because he was HD's relative. Similarly, in *Mason*, 486 Mich at 163-164, the Supreme Court found it irrelevant that the children's mother (who had been the children's custodian), and not the respondent-father, requested the children be placed with specific relatives. As noted by the Court, those relatives were "presumably the very people with whom respondent would have voluntarily placed [the children] had the DHS not already taken custody of them." *Id.*

We also find it irrelevant that the DHS intervened before the parents' placement of the child with HD could be made official. An informal agreement was already in place. Before a legal guardianship could be constructed, the DHS filed a petition to take the child into custody and itself placed the child in HD's care. At that point, just as in *Mason*, "it was unnecessary for respondent to make ongoing arrangements with the relatives that would permit [her] to preserve [her] rights and remain in contact with" her child. *Id.* at 164.

Accordingly, the circuit court erred in concluding that respondent failed to provide proper care and custody supporting jurisdiction because she did not effectuate the placement of her child with HD. To the extent *In re Systma*, 197 Mich App 453, 455-457; 495 NW2d 804 (1992), upon which the circuit court relied, conflicts with *Mason*, it must have been overruled by the Supreme Court's decision.

However, respondent's relative placement of the child does not preclude the circuit court from taking jurisdiction on other grounds. HD provided testimony suggesting that she did not prefer retaining the parents' rights to the child and a guardianship without court jurisdiction may not be feasible. As noted by the hearing referee in the findings of fact and recommendation:

> [HD] testified that she intended to keep the child in her care long term. She did not intend to return the child to Father when he was released from incarceration in approximately four years because she had "seen" what Father's other children "had gone through" and how they "feel abandoned." [HD] reported that she would be willing to adopt the child if the child were available for adoption.

Given this testimony, it does not stretch the imagination to presume that HD would be equally unwilling to relinquish custody upon respondent's much later release from prison. This issue will need to be addressed in more detail on remand.

We vacate and remand for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause

Court of Appeals, State of Michigan

ORDER

In re J. S. SESSIONS, Minor.

Docket No. 322460

LC No. 2014-014713-NA

Douglas B. Shapiro
Presiding Judge

Elizabeth L. Gleicher

Amy Ronayne Krause
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded as stated in the accompanying opinion, we remand the case to the trial court to reconsider the effect of the relative placement on the jurisdictional and termination decisions and whether the Indian Child Welfare Act was applicable. The proceedings on remand are limited to these issues.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

COURT OF APPEALS OF THE STATE OF MICHIGAN
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A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JAN 2 2 2015
Date

Chief Clerk