STATE OF MICHIGAN

COURT OF APPEALS

In re Z E Thomas, Minor.

UNPUBLISHED
May 15, 2018

No. 339967
Washtenaw Circuit Court
Family Division
LC No. 13-000176-NA

Before: METER, P.J., and GADOLA and TUKEL, JJ.

PER CURIAM.

Respondent father appeals as of right the trial court's order terminating his parental rights to his child, ZET, pursuant to MCL 712A.19b(3)(g) (failure to provide proper care and custody). Respondent contends that, as a direct result of his incarceration, reasonable efforts to reunify him with ZET were not made and that he was deprived of a meaningful opportunity to participate in the proceedings in violation of his right to due process. We affirm.

I. FACTUAL BACKGROUND

In November 2013, a neglect and abuse petition was filed against ZET's mother, Leslie Thomas, following an incident during which she left her three children, including ZET, unattended in a running vehicle while she was shopping. The trial court ordered that the children be temporarily removed from Ms. Thomas' custody but specified that reasonable efforts toward reunification be made and that Ms. Thomas be permitted supervised visitation with the children. Though the children's fathers were not initially named in the petition, the trial court ordered during the preliminary hearing held on November 7, 2013, that the fathers be named as respondents. An amended petition naming the fathers, including respondent, was filed on November 15, 2013. On December 12, 2013, Ms. Thomas pleaded to the allegations in the amended petition.

Throughout the duration of the proceedings, respondent was incarcerated out of state in federal prison, with a projected release date of July 7, 2020. Respondent first participated in the proceedings through his attorney during a January 30, 2014 pretrial hearing. Because the parties erroneously believed respondent was to be released from prison by January 20, 2014, the trial court had not issued a writ to secure his participation by telephone and therefore adjourned that part of the proceeding relating to his rights. However, at the next hearing held on March 6, 2014, the parties stipulated for unknown reasons to discharge each of the three fathers from the petition, though the trial court stated that the fathers would still be afforded the opportunity to

participate in the hearings. In a final reversal of course, the trial court ordered during a December 18, 2014 review hearing that the fathers be included in the case as respondents.

For the first time, respondent personally participated in the proceedings by telephone during a review hearing held on January 22, 2015. During this hearing, respondent requested appointment of counsel and suggested an alternative placement for ZET with respondent's mother. A foster care worker stated that, though respondent's mother's home had previously been assessed and found unsuitable as a possible placement, she would nonetheless reassess the home. The Department of Health and Human Services (DHHS) reevaluated respondent's mother's home on July 27, 2015; however, because respondent's mother also cared for a disabled adult in a one-bedroom apartment, her home was again determined to be unsuitable.

A petition naming respondent was filed on July 30, 2015. In gathering information to include in the petition, DHHS first interviewed respondent on July 8, 2015. During this interview, respondent suggested placement of ZET with respondent's mother or with his fiancée, Yolanda Hill. He also indicated that he was on the waiting list for parenting and substance abuse classes through the prison. On July 30, 2015, respondent participated in a family planning meeting with Ms. Thomas and DHHS case workers. At this time, he suggested possible placement of ZET with respondent's grandparents, who resided in Mississippi.

Respondent appeared by telephone on August 27, 2015 for a preliminary inquiry. During this hearing, respondent waived a probable cause determination, and the trial court authorized the petition. Respondent again appeared by telephone on October 1, 2015 for an adjudication hearing, at which time he pleaded to the allegations in the petition, including his criminal history and current incarceration with a projected release date in July 2020. During this hearing, the trial court also authorized unsupervised visits between Ms. Thomas and her children due to positive progress with her case service plan. On December 3, 2015, respondent participated in an initial disposition hearing during which his own case service plan was discussed. The trial court adopted the plan and ordered that respondent complete the parenting classes and psychology services offered through the prison.

On December 17, 2015, and March 10, 2016, respondent participated by telephone in review hearings. The reports discussed during these hearings reflected that Ms. Thomas' unsupervised visitation was going well and was to be increased. Though not discussed during the hearing, the March 10 report indicated that respondent had again suggested placement of ZET with respondent's grandparents in Mississippi. However, he agreed "to postpone the change of placement for [ZET] in order to assist [Ms. Thomas] with reunification for [ZET] and minimize the number of placements for [ZET]."

On April 21, 2016, DHHS reported during a review hearing that Ms. Thomas had tested positive for drugs in March. Accordingly, any visitation between her and the children was to be supervised. The trial court stressed during this hearing that, because the case had been ongoing for over two years, the parties should be prepared to discuss permanent placement goals at the next hearing. At the following hearing on May 26, 2016, DHHS announced its recommendation to change the goal in Ms. Thomas' case to adoption. Because respondent had not received the reports prior to this hearing, the trial court adjourned its determination with respect to ZET. When the trial court held this adjourned hearing on June 30, 2016, respondent requested that Ms.

Thomas be given more time to work toward reunification. The trial court determined that the permanent placement goal for ZET would remain unchanged at that time.

On December 1, 2016, Ms. Thomas voluntarily released her parental rights to ZET. Because respondent was unavailable to participate in the hearing, the trial court adjourned that portion of the hearing pertaining to his parental rights until December 22, 2016. On that date, DHHS sought a goal change with respect to respondent and ZET from reunification to adoption. It was revealed that respondent had recently married Ms. Hill, and he requested that DHHS assess Ms. Hill's home as a possible placement option for ZET. The trial court ordered that DHHS assess Ms. Hill's home but also directed DHHS to file a termination of parental rights petition with respect to respondent. Upon speaking with Ms. Hill, DHHS discovered that she did not qualify for relative placement for ZET, as she admitted that she and respondent were not married. DHHS filed an amended petition on February 24, 2017, seeking termination of respondent's parental rights pursuant to MCL 712A.19b(3)(g) (failure to provide proper care and custody), (h) (imprisonment), and (j) (likelihood of harm if returned).

The trial court conducted a two-day termination hearing on August 11 and 16, 2017, during which testimony was heard from respondent, a foster care caseworker, and ZET's counselor. Acknowledging that the initial focus of the case was reunification of ZET with Ms. Thomas, the trial court nonetheless observed that respondent had actively participated in the proceedings. Ultimately, the trial court concluded that statutory grounds for termination had been established by clear and convincing evidence under MCL 712A.19b(3)(g) and that a preponderance of the evidence supported that termination would be in ZET's best interests.

II. STANDARD OF REVIEW

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). This Court reviews the trial court's factual findings, as well as its ultimate determination that such statutory grounds have been established, for clear error. *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). "A finding is 'clearly erroneous' if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). However, whether a party was denied his right to procedural due process presents a constitutional question, which this Court reviews de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009).

III. DISCUSSION

A. REASONABLE EFFORTS

Respondent first contends that DHHS failed to make reasonable efforts toward reunifying ZET with respondent, as it failed to fully investigate relative placements suggested by respondent, failed to engage him for the first fourteen months of the case, and never implemented an adequate service plan. Thus, he argues there was an evidentiary "hole" in the record precluding the trial court from finding by clear and convincing evidence that he was unable to provide proper care to ZET. We disagree.

Generally, the state is required to make reasonable efforts to reunify a respondent with his children before seeking termination of parental rights. *In re Hicks/Brown*, 500 Mich 79, 85; 893 NW2d 637 (2017). "As part of these reasonable efforts, the Department must create a service plan outlining the steps that both it and the parent will take to rectify the issues that led to court involvement and to achieve reunification." *Id*. at 85-86, citing MCL 712A.18f(3)(d). Our Supreme Court, in *In re Mason*, 486 Mich 142, 159; 782 NW2d 747 (2010), held that DHHS is not relieved of this statutory duty with respect to an incarcerated parent. In that case, DHHS exclusively focused its efforts on reunifying children with their mother and failed to involve, evaluate, or provide services to the incarcerated father. *Id*. Specifically, the father was invited to participate by telephone in only two hearings before the termination hearing and was unable to complete the service plan due to the limited resources offered through the prison. *Id*. at 153. Our Supreme Court found that, by failing to involve the father in the proceedings, the trial court failed to develop a factual record from which it could conclude that the father was unable to provide adequate care for his children. *Id*. at 166. Thus, the Supreme Court concluded that incarceration alone is insufficient grounds for termination, and that "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.' " *Id*. at 159-160, quoting *In re Rood*, 483 Mich at 119.

We first turn to respondent's contention that DHHS failed to investigate the alternative placement options he suggested. Initially, we note that respondent failed to preserve this specific issue for appeal, as he did not raise such an objection before the trial court. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Nonetheless, "[t]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice." *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010). Because it is undisputed that respondent was unable to personally provide care for ZET due to his incarceration, this case at its crux hinges entirely on whether respondent was afforded sufficient opportunity to arrange for care and custody to be provided by a legal relative. Accordingly, this Court considers respondent's argument.

As emphasized in *In re Mason*, 486 Mich at 160-161, consideration of an incarcerated parent's suggestions for relative placement is critical, as "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination. . . . [*A*]*lthough the parent is in prison*[,] he need not *personally* care for the child." (Emphasis in original). Thus, courts must evaluate whether an incarcerated parent could provide proper care and custody in the future by voluntarily granting legal custody to relatives for the remaining term of his incarceration. *Id*. at 163.

Here, respondent was afforded ample opportunities to offer suggestions for potential placement options with relatives who could retain custody of ZET until respondent was released from prison in July 2020. During a review hearing held on January 22, 2015, respondent was asked whether he was aware of potential alternative placements, and he suggested his mother. DHHS interviewed respondent on July 8, 2015, and he was included in a family planning meeting on July 30, 2015, during which he suggested placement with his grandparents in Mississippi. A Foster Care Report dated March 10, 2016, indicated that respondent had again suggested placement with his grandparents but agreed to postpone this request to facilitate Ms. Thomas' reunification efforts in Michigan. During a review hearing held on December 22, 2016,

respondent proposed placement with his purported wife, Ms. Hill. Though DHHS expressed its doubt that this suggestion would alter its position with respect to a goal change to adoption, it nonetheless made reasonable efforts to assess placement with Ms. Hill, who it then determined was not in fact respondent's wife. Finally, during a pretrial review hearing held on May 12, 2017, respondent's attorney asked him for any further placement options he would suggest for ZET; he stated that he was looking into the matter and would update his attorney when possible.

The record demonstrates that respondent's proposed placements were considered and deemed unsuitable options. First, contrary to respondent's representations on appeal, the record indicates that his mother's home was assessed and deemed unsuitable sometime between September 5, 2014, and December 16, 2014, before respondent became involved in the proceedings. DHHS then reevaluated her home on July 27, 2015, upon respondent's request. On both occasions, DHHS determined the home was unsuitable because respondent's mother cared for a disabled adult in a one-bedroom apartment on a limited income. Second, with respect to Ms. Hill, when DHHS contacted her regarding the potential placement, she admitted she was not married to respondent. Thus, because she did not meet the definition of "relative," see MCL 712A.13a(j), she was ineligible for relative placement, see MCL 722.954a(5) ("[A] supervising agency shall give special consideration and preference to a child's *relative* or *relatives* who are willing to care for the child . . . ." (emphasis added)). Lastly, though respondent twice suggested placement with his grandparents in Mississippi, he agreed to postpone this request in order to assist Ms. Thomas with reunification efforts taking place in Michigan. After Ms. Thomas voluntarily released her rights, respondent never revisited this suggestion, even though his attorney solicited alternative placement options and even though he requested that Ms. Hill's home be evaluated. Accordingly, we conclude that DHHS fulfilled its obligation under MCL 722.954a(2) to consult with respondent "to determine placement with a fit and appropriate relative who would meet" ZET's needs.

We next consider respondent's arguments that DHHS failed to engage him for the first fourteen months of the case and failed to implement a service plan. The proceedings were initiated against Ms. Thomas on November 7, 2013, and respondent was named in an amended petition filed on November 15, 2013. Respondent was able to participate through counsel in a pretrial hearing held on January 30, 2014. Thereafter, he was discharged as a respondent on March 6, 2014, but the trial court later determined on December 18, 2014, that he must be included as a respondent. Respondent next appeared before the trial court during a review hearing held on January 22, 2015, and was interviewed and formally named in the petition in July 2015. The documentation included in the record during the ten-month period between March 6, 2014, and January 22, 2015, suggests that DHHS was focusing its reunification efforts on Ms. Thomas by assisting her to secure psychological and substance abuse services.

Our Supreme Court has acknowledged that DHHS is not prevented "from *initially* focusing reunification efforts on the custodial parent, consistent with the statutory mandates that a child be placed 'preferably in his or her *own* home . . . .' " *In re Rood*, 483 Mich at 119, quoting MCL 712A.1(3) (emphasis in original). However, if efforts at reunification with a custodial parent prove unsuccessful, the state must make reasonable efforts to reunify the child with the noncustodial parent. *Id*. at 121. Reunification efforts directed at Ms. Thomas progressed well until May 2016, when DHHS recommended a goal change to adoption after she had tested positive for drugs. Respondent did not object to the initial goal of reunifying ZET

with Ms. Thomas. In fact, he sought to facilitate these efforts by postponing his suggested placement of ZET with his grandparents in Mississippi and by requesting that the trial court grant Ms. Thomas more time to progress with reunification. As discussed above, respondent failed to demonstrate his ability to provide proper care and custody of ZET by offering viable placement options, either before or after Ms. Thomas released her parental rights.

With respect to respondent's contention that DHHS never implemented a service plan, respondent indicated on the record during a hearing held on December 3, 2015, that he had received from DHHS a proposed service plan and had reviewed it with his attorney. The plan proposed that respondent participate in parenting classes and psychological services, which the caseworker confirmed were offered through the prison.[1] The trial court ordered that respondent comply with this plan. During a review hearing held on April 21, 2016, respondent reported he was satisfied with and had no concerns regarding his treatment plan. Finally, during the termination hearing, respondent stated that he had completed a parenting skills class. At no time during the proceedings did respondent request additional services or convey any other concerns.

In rendering its determination that termination was in ZET's best interests, the trial court stated that, to the extent there was a case service plan in place, respondent had complied. The trial court commended respondent for taking part in parenting classes and held that parenting ability was a factor that weighed neither in favor of nor against respondent. Specifically, the trial court stated, "I don't have anything to indicate that he would be a bad parent, other than the fact he's not been able to demonstrate it to date." Rather, the trial court determined that statutory grounds for termination existed under MCL 712A.19b(3)(g) because respondent did not have a plan in place for placement of ZET with relatives until he was released from prison in July 2020. Thus, the fact that the caseworker who testified during the termination hearing may have been uninformed regarding respondent's compliance with the service plan did not result in harm to respondent, as the trial court credited his assertion that he had complied. Further, respondent's ability to participate in a service plan in order to demonstrate or strengthen his parenting abilities was ultimately immaterial to the trial court's determination.

Thus, we conclude that the record before the trial court was sufficient to demonstrate by clear and convincing evidence that respondent was unable to provide proper care or custody to ZET, either presently or within a reasonable time, in accordance with the statutory grounds set forth in MCL 712A.19b(3)(g).

B. DUE PROCESS

Relying on arguments similar to those discussed above, respondent contends that he was deprived of due process because he was not afforded a meaningful opportunity to participate in the proceedings. We disagree.

[1] Even before receiving the proposed service plan, respondent reported to DHHS in July 2015 that he was taking substance abuse classes and was on a waiting list for parenting classes.

Though respondent concedes that this issue was not preserved at trial, this Court nonetheless reviews unpreserved constitutional challenges for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). "A natural parent has a fundamental liberty interest 'in the care, custody, and management' of his child that is protected by the Fourteenth Amendment of the United States Constitution . . . and by article 1, § 17, of the Michigan Constitution." *In re Rood*, 483 Mich at 91, quoting *Santosky v Kramer*, 455 US 745, 753-754; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Thus, when the state seeks to terminate parental rights, "it must provide the parents with fundamentally fair procedures." *Santosky*, 455 US at 754. Procedural due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner." *In re Rood*, 483 Mich at 92 (quotation marks and citations omitted).

Respondent first contends that his exclusion from the first fourteen months of the proceedings constituted a violation of his due process rights. Though respondent claims he was excluded from the inception of the proceedings, he was named as a respondent in an amended petition filed on November 15, 2013, and participated through counsel in a pretrial hearing held on January 30, 2014. This Court has described above the circumstances leading to respondent's exclusion from the case between March 6, 2014, and January 22, 2015. Over this period, no hearings were held and very little documentation of DHHS activity exists in the record. Upon review of the record, this Court observes that the overwhelming substance of the case, including review hearings, took place after January 22, 2015, with respondent's participation. The case did not proceed to a termination hearing until August 2017, two and a half years after respondent began to participate. Thus, respondent did not miss " 'the crucial, year-long review period during which the court was called upon to evaluate the parents' efforts and decide whether reunification of the children with their parents could be achieved.' " *In re DMK*, 289 Mich App 246, 254; 796 NW2d 129 (2010), quoting *In re Mason*, 486 Mich at 155. Indeed, whereas permanency planning hearings are typically conducted within one year of a child's placement in foster care, see MCL 712A.19a, the trial court here did not direct DHHS to file a termination petition until December 22, 2016.

Contrary to respondent's assertions, nothing in the record suggests that DHHS was unwilling to consider alternative placement options by the time respondent was included in the proceedings. This Court has described above the efforts made by the trial court and by DHHS to solicit and investigate respondent's placement suggestions. In fact, DHHS had previously considered and investigated respondent's mother as a potential placement option before respondent offered the suggestion. Moreover, DHHS did not seek to maintain ZET permanently in foster placement, as it sought ultimately to reunify ZET with Ms. Thomas until it recommended a goal change to adoption on May 26, 2016. To the extent that respondent reargues as a due process challenge that DHHS' initial focus on reunification efforts with Ms. Thomas was improper, this Court has considered and addressed that issue. We thus conclude that respondent was afforded a meaningful opportunity to present objections and provide input regarding ZET's care and custody.

Respondent contends that, even after he was permitted to participate in the proceedings, this opportunity was not meaningful. Respondent claims that DHHS consistently failed to timely send him regular reports, in spite of his counsel's and the trial court's repeated requests that DHHS provide these reports at least two weeks in advance of hearing. This Court observes that

at any time respondent was unavailable for hearing through the prison or was not timely provided reports in advance of the hearing, the trial court adjourned that portion of the hearing relating to respondent's parental rights in order to permit him an opportunity to review those materials and discuss them with his attorney. Indeed, during closing arguments of the termination hearing, respondent's attorney likewise acknowledged the trial court's efforts to provide meaningful participation through adjournment:

> I think from the time I appeared in the case in early 2015, I can't speak to before that, [respondent] has had the opportunity to participate by [tele]phone. We've adjourned many, I think, a hearing because somehow, we couldn't get through and everything like that. If the report wasn't in on time or enough sufficient—probably into the Court on time, but not sufficient for me to get it to him or for the agency to send it, I think the Court has always been very liberal in adjourning so [respondent] has the opportunity to review it.
>
> So, I think the procedural aspects of this case and the protections, so [respondent] can participate, have been met and I should point out too, that [respondent] has been a willing and wanting participant in the process.

Thus, the trial court rectified any procedural deficiencies caused by DHHS' delays by granting adjournments to provide respondent an opportunity to present any objections at a later time. Cf. *In re Rood*, 483 Mich at 119 (holding that subsequent notice of the termination proceedings was insufficient under the circumstances to provide due process because the court "refused to delay termination in order to rectify the earlier deficiencies in notice.").

Respondent claims that DHHS' failure to timely send him reports left him uninformed regarding Ms. Thomas' difficulties and the resulting need for alternate placement for ZET. However, the record reveals that Ms. Thomas was making progress until March 2016, when she tested positive for drugs. This relapse was first discussed during the review hearing held on April 21, 2016. Respondent participated in this hearing by telephone and timely received reports – thus, he was timely informed of this development. Respondent further highlights that, because he had not received the reports in advance of the review hearing held on May 26, 2016, he was "shocked to learn" during this hearing that DHHS was recommending a change in ZET's permanency goal from reunification with Ms. Thomas to adoption. Although respondent asserts that the trial court addressed his confusion by instructing him simply to "read through the reports," the court also adjourned that portion of the hearing relating to ZET. Accordingly, we conclude that respondent was afforded a meaningful opportunity to participate in the proceedings.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael F. Gadola
/s/ Jonathan Tukel