S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

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September 1, 2011

In the Matter of S. MCEACHERN, JR., Minor.

No. 300601
Wayne Circuit Court
Family Division
LC No. 10-492790-A

In the Matter of BARROS/MCEACHERN/
STURMAN, Minors.

No. 303176
Wayne Circuit Court
Family Division
LC No. 10-492790-NA

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

TALBOT, P.J. (*concurring*).

While I concur with the majority opinion and points raised by Judge Gleicher in her concurrence, I write separately to address the issues raised.

As posed by S. McEachern, the issue presented challenges both the propriety of the lower court's assumption or jurisdiction and its decision to place the minor child in foster care rather than in his home as the child's father. As has been repeatedly recognized with respect to the issue of jurisdiction, "The family court's jurisdiction is tied to the children, making it possible, under the proper circumstances, to terminate parental rights even of a parent who, for one reason or another, has not participated in the protective proceeding."[1] Once jurisdiction is obtained over the child, the trial court may take measures against "any adult."[2] Based on the record before this Court, there existed more than a sufficient basis for the lower court to assume jurisdiction in this matter based on legitimate concerns pertaining to the mother's history and the current

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[1] *In re CR*, 250 Mich App 185, 205; 646NW2d 506 (2002) (footnote omitted). I would note that our Supreme Court is in the process of scrutinizing the "one parent doctrine" adopted in *In re CR*. *In re Mays*, 489 Mich 857; 795 NW2d 6 (2011).

[2] *In re LE*, 278 Mich App 1, 17; 747 NW2d 883 (2008).

circumstances existing in the child's home leading to the intervention by the Department of Human Services (DHS). I believe both the majority opinion and Judge Gleicher's concurrence are in agreement on this aspect of the issue. Judge Gleicher's concern focuses on the expansion of case law[3] to encompass McEachern's challenge to the placement of the child in foster care rather than his home as the child's father.

While appreciative of this concern, I believe certain basic premises are being overlooked. Although we must acknowledge the compelling and inherent interest and rights of a parent to care for their child[4], it is also important to recognize the commensurate and significant interest of the government in protecting the welfare of children.[5] McEachern mistakenly construes placement of the child with a relative to be automatic or a prerequisite rather than merely a preference. Further, a distinction exists with regard to placement options when termination of the non-custodial parent's rights is being pursued. Specifically:

> [W]e note that we do not prohibit the courts or the DHS 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. . . ." But when unsuccessful efforts at reunification with the custodial parent cause the state to reconsider the permanency plan, there is no excuse for its failure to adequately notify the noncustodial parent of his right to involvement. Because failure to participate in the service plan is an explicit factor that may justify termination, a parent has a due process right to notice of his opportunity to be assessed as a potential placement for his child before the state pursues termination on grounds that might have been remedied through assessment. To this end, we note that the statutory preferences given to a child's placement in his "own home," or in "close proximity to the child's parents' home," may be difficult to apply in some cases because the text appears to presume that both parents reside in the same home. A noncustodial parent's rights appear to be recognized by references to a "parent" or "parents" and by the requirements that a child be placed in "the most family-like setting available" and permanently reunified with his "family" if possible. Yet references to a child's "own home" appear to favor the custodial parent's home. There is no reason to conclude that a parent has a diminished constitutional right to his child merely because he does not have physical custody of that child. To the contrary, specifies that "natural parents," not just custodial parents, have a fundamental liberty interest "in the care, custody and management of their child" and that this interest persists although they are not "model parents" and even if they "have lost temporary custody of their child to the State." Therefore, our reading of the statutes must account for a noncustodial parent's rights. . . . Accordingly, the statutory references to placement or reunification with "a

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[3] See *In re CR*.

[4] *In re Render*, 145 Mich App 344, 349; 377 NW2d 421 (1985).

[5] *In re Brock*, 442 Mich 101, 112-113; 499 NW2d 752 (1993).

> parent," "parents," or "family" must be read to include noncustodial parents when appropriate. Perhaps most significantly, the mandate that "[r]easonable efforts to reunify the child and family must be made in all cases," is not fulfilled merely through efforts to reunify the child and the custodial parent. Reunification efforts may be initially directed at a custodial parent when appropriate, consistent with the statutory preferences for a child's "own home." But if these efforts are unfruitful, the state must also make reasonable efforts to reunify the child with the noncustodial parent. Accordingly, unless the noncustodial parent is statutorily disqualified from becoming his child's custodian, the state must notify the noncustodial parent of his right to be evaluated as a potential placement and of his statutory right to receive services if appropriate.[6]

Clearly this indicates the existence of a process to be followed and not an automatic assumption with regard to the placement of a child.

Based on case law and statutory guidelines, the issue was improperly framed by McEachern. In actuality his challenge is with the failure of DHS to efficiently pursue the process to determine the propriety of placement for the child with his father and not necessarily the election to place the child in foster care. Given the lower court record and the myriad concerns that existed regarding the ability of McEachern to provide a safe and stable environment for this child, it was not error to place him in foster care after having obtained jurisdiction. The failure here was that of DHS to follow proper procedure in a timely and efficient manner. Although I would find the handling of this matter by DHS inadequate on certain levels, as both the majority and Judge Gleicher recognize the outcome determined by the trial court is unassailable.

/s/ Michael J. Talbot

[6] *In re Rood*, 483 Mich 73, 119-122; 763 NW2d 587 (2009) (internal citations and footnotes omitted).