STATE OF MICHIGAN

COURT OF APPEALS

In re B. A. DOERING, Minor.

UNPUBLISHED
January 14, 2021

No. 351631
Monroe Circuit Court
Family Division
LC No. 19-024719-NA

AFTER REMAND

Before: TUKEL, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Respondent-father appeals as of right the order terminating his parental rights to his minor child, BD, under MCL 712A.19b(3)(g) (failure to provide proper care or custody), and (j) (reasonable likelihood child would be harmed if returned to parent). This case returns to us after our remand to the trial court "to either order that reasonable services be provided to respondent, or articulate a factual finding by clear and convincing evidence that aggravated circumstances exist such that services are not required." *In re B. A. Doering*, Minor, unpublished per curiam opinion of the Court of Appeals, issued July 16, 2020 (Docket No. 351631). We now affirm.

In our prior opinion, we set forth the relevant factual background and need not repeat it in its entirety here. Relevant to the instant matter, on March 7, 2019, petitioner filed a petition, listing respondent as the minor child's putative father, and requesting the trial court to authorize the petition and take jurisdiction over the child. The petitioner further requested that the trial court issue an order removing the minor child from the home, indicating that it was "contrary to the welfare of [the minor child] to be in the care or custody of respondent father, [], as [respondent father] has not established a legal relationship with [the minor child]." In June 2019, DNA analysis revealed that respondent was BD's biological father, and the trial court thereafter entered an order declaring him BD's legal father.

On remand, the trial court appears to have taken great exception to this Court's reasoning for its remand order. Indeed, the trial court indicated several times its confusion with this Court's remand order because it believed that no efforts need be made toward reunification of the family

if the Department of Health and Human Services (DHHS) seeks termination of parental rights in its initial petition. However, prior to the initial appeal, *the trial court ordered*, several times, that efforts at reunification needed to be made in this matter.

On July 9, 2019 (after the trial court determined respondent to be the legal father of the child), petitioner filed a supplemental "Petition for Jurisdiction and Termination of Parental Rights at Initial Disposition." In the petition, petitioner sought termination pursuant to MCL 712A.19b(3)(b)(i), (b)(ii), (g), (j), (k)(i) and (k)(iii). On July 17, 2019, a preliminary hearing was held, at which DHHS employee Eva Kopas testified that due to respondent's incarceration, the minor child could not be placed with him at that time. Kopas further testified, "[t]here's not many services we can provide to dad, given that his incarceration happened prior to our abuse and neglect [petition] . . .we have made contact with the prison to see what services are available, and what he can do from there . . . ." On the same date, the trial court entered an "order after preliminary hearing" which contained, among other things, a checked box at 18.b. stating that "[r]easonable efforts shall be made to preserve and reunify the family to make it possible for the child(ren) to safely return home." There is a box available on the order at 18.b. that the trial court could have checked indicating that "[r]easonable efforts shall not be made to preserve and reunify the family because it would be detrimental to the child(ren)'s health and safety," but the court did not check that box. The trial court also did not check the box at 17.a., which states that "[r]easonable efforts are not required to prevent or eliminate the child(ren)'s removal from the home due to aggravated circumstance(s) . . . as provided in section MCL 722.638(1) and (2) . . . ." Perhaps it was not the trial court's intent to order that reasonable efforts toward reunification should be made, but basic and longstanding law directs that "[a] trial court speaks through its written orders." *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). See also, *People v Davie (After Remand)*, 225 Mich App 592, 600; 571 NW2d 229 (1997).

The trial court continued, throughout the proceedings, to order that reasonable efforts toward reunification were to be made. After an August 6, 2019 pretrial conference, for example, the trial court entered an "order after pretrial hearing" which provided at box 12.a. that "[c]onsistent with the circumstances, reasonable efforts to prevent or eliminate removal of the chil(ren) from the home were made as determined in a prior order." In the same order, box 14.a. was checked, which provides that "[r]easonable efforts shall be made to preserve and reunify the family to make it possible for the child(ren) to safely return home." Again, the trial court had the option of checking boxes on the order indicating that reasonable efforts to eliminate the child's removal from the home and/or to preserve and reunify the family not be made, but it did not do so.

After a pretrial conference, the trial court entered an order on September 18, 2019, indicating that all of its "prior orders/findings continue except as modified herein." The findings/order regarding efforts at reunification were not modified in the order. After a final pretrial conference, the trial court entered an order on October 24, 2019, again continuing its prior orders/findings. Thus, the trial court ordered that reasonable efforts at reunification needed to be made.

A combined adjudication and termination trial was held on November 7, 2019, at which respondent requested to be provided with a service plan. The trial court entered an "order of adjudication" on the same day finding at box 10. that, after trial, there are statutory grounds to exercise jurisdiction over the child, at box 13.a. that "[c]onsistent with the circumstances,

reasonable efforts to prevent or eliminate removal of the child(ren) from the home were made as determined in a prior order," and, at box 15.a. that "[r]easonable efforts shall be made to preserve and reunify the family to make it possible for the child(ren) to return home." On November 8, 2019, the trial court entered an "order following hearing to terminate parental rights," in which it checked box 7.a. that "[r]easonable efforts were made to preserve and unify the family to make it possible for the child(ren) to safely return to the child(ren)'s home. Those efforts were unsuccessful." In the order, the trial court also held that there was clear and convincing evidence that statutory bases exist under MCL 712A.19b(3)(g) and (j) for terminating respondent's parental rights.

Respondent argued on appeal that the trial court prematurely terminated his parental rights because petitioner did not provide him with a service plan, and therefore, did not make reasonable efforts at reunification. As previously indicated, we remanded the matter to the trial court to ensure that reasonable services be provided to respondent or articulate a factual finding by clear and convincing evidence that aggravated circumstances exist such that services are not required.

As we stated in our prior opinion in this matter, "[r]easonable efforts to reunify the child and family must be made in all cases except those involving aggravated circumstances under MCL 712A.19a(2)." *In re Rippy*, 330 Mich App 350, 355; 948 NW2d 131 (2019), citing *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). MCL 712A.19a provides, in relevant part:

> (1) Subject to subsection (2), if a child remains in foster care and parental rights to the child have not been terminated, the court shall conduct a permanency planning hearing within 12 months after the child was removed from his or her home. . . .
>
> (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:
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> (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.
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> (b) The parent has been convicted of 1 or more of the following:
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> (i) Murder of another child of the parent.
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> (ii) Voluntary manslaughter of another child of the parent.
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> (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 and the parent has failed to rectify the conditions that led to that termination of parental rights.
>
> (d) The parent is required by court order to register under the sex offenders registration act.

Thus, no efforts at reunification must be made if there is a *judicial determination* that the parent has subjected the child to aggravated circumstances as provided in MCL 722.638. MCL 722.638, in turn, provides in relevant part:

> (1) The department shall submit a petition for authorization by the court under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, if 1 or more of the following apply:
>
> (a) The department determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child and the abuse included 1 or more of the following:
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> (i) Abandonment of a young child.
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> * * *
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> (b) The department determines that there is risk of harm, child abuse, or child neglect to the child and either of the following is true:
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> * * *
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> (ii) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, or a similar law of another state, the parent has failed to rectify the conditions that led to the prior termination of parental rights, and the proceeding involved abuse that included 1 or more of the following:
>
> (A) Abandonment of a young child.

MCL 722.638(2) additionally provides that the DHHS shall seek termination of parental rights in the initial disposition "if 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 . . . ." And MCL 722.638(3) states that if the DHHS is considering petitioning for termination of parental rights at the initial dispositional hearing "even though the facts of the child's case do not require departmental action under subsection (1), the department shall hold a conference among the appropriate agency personnel to agree upon the course of action." It is thus apparent that while MCL 722.638 permits (or requires in some circumstances) that the DHHS *seek* termination in an initial disposition, seeking termination by the department is markedly different from a *judicial determination* that reasonable efforts to reunite the child and family are not required due to aggravated circumstances as set forth in MCL 712A.19a. MCL 712A.19a(2) explicitly

imposes a duty upon the trial court to make reasonable efforts at reunification unless that trial court has made a judicial determination that reasonable efforts to reunify a child and his or her family are not required due to aggravating circumstances. That the department may request termination at an initial disposition does not somehow relieve the trial court of its duty to make judicial determinations regarding reasonable efforts at reunification.

This Court aptly demonstrated the above in *In re Rippy*, 330 Mich App 350. In that case, "[i]n its petition, the DHHS sought termination at the initial dispositional hearing under MCL 722.638 because it believed that [the minor child] had suffered severe physical abuse at the hands of respondent." *Id*. at 357. The trial court found grounds to assume jurisdiction over the child and held that "the DHHS had established statutory grounds for termination by clear and convincing evidence . . . ." *Id*. at 358. The respondent appealed the trial court's decision to this Court, contending that the DHHS failed to make reasonable efforts to reunite her with the minor child. *Id*. at 355. A panel of this Court began its analysis as follows:

> Reasonable efforts to reunify the child and family must be made in all cases except those involving aggravated circumstances under MCL 712A.19a(2). *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (quotation marks and citation omitted). MCL 712A.19a(2)(a) states that reasonable efforts to reunify the child and family are not required if "[t]here 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. [*Id*.]

Ultimately, this Court found:

> . . . it is clear from its stated findings that the trial court determined that [the minor child] had suffered severe physical abuse (respondent's excessive consumption of alcohol while pregnant) that resulted in a life-threatening injury [] and that respondent was the perpetrator of this abuse. These findings amount to a judicial determination that respondent subjected [the minor child] to aggravated circumstances as provided in MCL 722.638(1) and (2). Therefore, under MCL 712A.19a(2)(a), the DHHS was not required to make reasonable efforts to reunite respondent with [the minor child], and respondent's argument that the DHHS failed to make reasonable efforts has no merit. [*Id*. at 358-359]

From the above, it is clear that where a petition requests termination of a parent's parental rights at the initial disposition, in order to terminate the parental rights at that initial disposition the trial court must make a judicial determination that reasonable efforts at reunification need not be made.

As noted in our prior opinion, the petition requested termination of respondent's parental rights at the initial disposition, but the trial court did not explicitly make a judicial determination that reasonable efforts at reunification were not required due to aggravated circumstances. Remand from this Court was therefore necessary.

At the October 8, 2020 hearing on remand, counsel for the DHHS stated that he believed there were aggravating circumstances that would excuse the department from providing respondent with reasonable efforts to be reunified with the minor child. Counsel also stated:

> I do apologize that the department had not brought this to the court's attention previously. It should have been brought up at the first hearing. It should have been argued at the trial. We neglected to do so, but I am thankful for the opportunity to correct the record here today and to provide the Court with the opportunity to make those findings excusing those reasonable efforts.

The trial court thereafter stated that despite the fact that respondent knew he may be BD's father, he did nothing to establish his paternity of the child until ordered to do so by the trial court. According to the trial court, respondent lived with the mother and BD until BD was approximately three months old, then was absent from the child's life until she was three years old. The trial court acknowledged that when BD's mother passed away, respondent tried to get involved in the child's life, but was, at that point, in prison, with his earliest release date being over a year away. As a result, BD was left without proper care and custody at the time of mother's death. The trial court further noted that there was no evidence that respondent financially supported BD after she was three months old and no indication that he was now able to do so. The trial court opined that there was no bond between respondent and BD as he had not been physically present in her life for almost three years, there was no evidence he communicated with her in any way, and respondent displayed a complete lack of interest in the child until the court got involved. The trial court thus opined that respondent had abandoned BD and that under the totality of the circumstances, respondent's abandonment of BD was an aggravating circumstance that relieved the department of an obligation to provide a case service plan and services to respondent. The trial court also noted the following: that respondent showed ongoing criminal conduct, most concernedly assaultive behaviors, even while he was imprisoned, which demonstrated a current risk of harm to BD; that respondent voluntarily terminated his parental rights to another child following the initiation of a child protective proceeding; that respondent failed to rectify the conditions that led to the prior termination of parental rights; and, that the facts of the case amount to respondent's neglect and abandonment of BD.

We agree with the trial court that abandonment of BD was established by clear and convincing evidence. "A parent abandons, or 'deserts,' his child if he is absent for more than 91 days and has not sought custody of his child." *In re Rood*, 483 Mich 73, 127 n 5; 763 NW2d 587 (2009). We further find that the trial court made an appropriate judicial determination that respondent subjected BD to aggravating circumstances pursuant to MCL 712A.19a(2)(a) and MCL 722.638, and that the department was thus not required to make reasonable efforts to reunify respondent with BD. Termination of respondent's parental rights was thus not premature[1].

Affirmed.

/s/ Jonathan Tukel
/s/ Deborah A. Servitto
/s/ Jane M. Beckering

[1] Respondent makes no argument with respect to whether the statutory grounds for termination had been established by clear and convincing evidence. Thus, we need not address that issue.