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From the Editor: Tending Mason

Hon. Michael J. Anderegg

Long ago, when I was a young man, I worked on a construction crew. My job title was “mason tender.” I built and tore down scaffolding and made sure that my crew of four masons had adequate supplies of concrete blocks and the mortar they needed to cement the blocks together. It was hard work, but necessary so that the construction crew’s work went forward smoothly and the building was completed in a timely fashion.

There are some parallels between that job and presiding over terminations of parental rights hearings in the aftermath of In re Mason, 486 Mich 142; 782 NW² 747 (2010). Mason, you will recall, is the case in which Justice Corrigan, writing for a four-justice majority, reversed the termination of parental rights of an incarcerated father. The petition at the trial court level requested termination on four of the statutory grounds set forth in MCL 712A.19 (b) (3): Subsections (c) (failure to rectify); (g) (neglect); (h) (imprisonment for more than two years); and (j) (likely risk of future harm). The Supreme Court focused primarily on the incarceration ground, because the allegations and evidence almost exclusively focused on that aspect of the case. The court also based its ruling on the trial court’s failure to arrange

for Mr. Mason to participate in all hearings as required by MCR 2.004.

Aside from the obvious wisdom of complying with statutes and court rules, what lessons can we learn from the Mason case?

A judge presiding over a termination case is like the foreman on a construction job. He or she must plan ahead, and make sure that the needed resources are available to masons, laborers, and even mason tenders.

The outcome of the Mason case reinforces the wisdom of conducting a pretrial conference in termination cases. The pretrial conference is an opportunity to review the allegations and to ask the parties to think about which witnesses or evidence will support each allegation.

A pretrial conference is also an opportunity for the judge to make sure that the statutory grounds alleged are consistent with what has happened during the case up to the time the termination petition was filed. Although new grounds may be alleged in a termination petition, the entire child protective proceeding is considered to be a “single, continuous proceeding” under In re Sharpe, 68 Mich App 619; 243 NW² 696 (1976).

As the majority opinion in Mason points out, there is some overlap in the statutory grounds set forth in MCL 712A.19 (b) (3). For example, the same evidence may support a finding of neglect under MCL 712A.19 b (3) (g) as well as a finding of a risk of future

harm under MCL 712A.19 b (3) (j). There is a tendency among some petitioners to use the “shotgun approach” that was used at the trial court level in Mason, and allege all the grounds that might have any possible application to the facts in the hope of finding at least one an appellate court will like. At a pretrial conference, a judge can discourage this tendency by referring to each statutory ground alleged and inquiring about what evidence the petitioner hopes will prove that allegation. The petitioner can add or delete grounds, and still have time to provide adequate notice prior to the full hearing.

A final benefit of a comprehensive pretrial is that the court can inquire about what witnesses or evidence the petitioner hopes will show that termination is in the child’s best interests. The recommendation of the guardian ad litem will be very important to the court’s best interests determination, but it is by no means the only evidence the court should consider.

Reversals in termination cases are costly and disruptive. They impair our ability to provide permanency as promptly as possible for children under our jurisdiction. The Mason decision is a reminder that these cases deserve our best efforts, both to manage them and to assure that the rights of all parties are protected. If we do our part, the “crews” we supervise will be able to build structures that are tall, strong, and able to survive stormy weather. ■

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