Order

Michigan Supreme Court
Lansing, Michigan

April 8, 2022

Bridget M. McCormack,
Chief Justice

163725 & (58)

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

In re SMITH-TAYLOR, Minors.

SC: 163725
COA: 356585
Wayne CC Family Division:
2019-002165-NA

_____/

By order of February 2, 2022, the petitioner Department of Health and Human Services was directed to answer the application for leave to appeal the October 14, 2021 judgment of the Court of Appeals. In lieu of filing an answer, the Department joined the respondent-mother in a motion to remand the case to the trial court because the Department concedes that it did not make reasonable efforts to reunite the family as required by statute. See MCL 712A.19a(2). On order of the Court, the application for leave to appeal is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REMAND this case to the Wayne Circuit Court for further proceedings consistent with this order.

The Court of Appeals erred by concluding that the Department was excused from preparing a case service plan for the respondent. See *In re Smith-Taylor*, ___ Mich App ___ (2021) (Docket No. 356585); slip op at 1. "Reasonable efforts to reunify the child and family must be made in *all* cases" absent aggravated circumstances. *In re Mason*, 486 Mich 142, 152 (2010) (quotation marks and citation omitted). Reasonable efforts must include "a service plan outlining the steps that both [the Department] and the parent will take to rectify the issues that led to court involvement and to achieve reunification." *In re Hicks*, 500 Mich 79, 85-86 (2017). It is undisputed that the Department failed to create a case service plan for the respondent. And yet, on appeal, the panel affirmed the trial court's decision to terminate her parental rights. Its conclusion that the Department was excused from creating a case service plan because aggravated circumstances applied misunderstood both the factual record and the law.

Under MCL 712A.19a(2)(a), there must be a "judicial determination that the parent has subjected the child to aggravated circumstances" before the Department is excused from making reasonable efforts. Aggravated circumstances are defined in MCL 722.638 to include "[b]attering, torture, or other severe physical abuse" of a child or sibling. MCL 722.638(1)(a)(*iii*). Aggravated circumstances are present both for a parent who is a "suspected perpetrator" of such abuse and a parent who 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[.]" MCL 722.638(2).

While the respondent was hospitalized, her two eldest children, DL and DE, were placed in temporary custody with Child Protective Services (CPS). A CPS investigator visited the respondent in the hospital, and the respondent explained that the children's father's home was an unfit environment. Over her objection, the Department approved placement of DL and DE with their father. DE was hospitalized for severe injuries consistent with nonaccidental trauma while the respondent was still hospitalized.

The Department sought termination of the parental rights of both the respondent and the father. At the preliminary hearing, the trial court found aggravated circumstances of severe physical abuse by the father excused the Department from making reasonable efforts to reunify him with his children. But it found reasonable efforts were still required as to the respondent. The court continued to reiterate the need for reasonable efforts as the case progressed. Although the Department never created a case service plan, the trial court nevertheless terminated the respondent's parental rights, finding that the mental health services that she sought and received on her own amounted to reasonable efforts by the Department. This was an error.

On appeal, the respondent challenged the Department's failure to make reasonable efforts. The Court of Appeals began its analysis by concluding that the respondent failed to preserve the issue because she failed to "raise the issue at the time the services [were] offered." *In re Smith-Taylor*, ___ Mich App at ___; slip op at 5. But because services were never offered, the panel created an impossible obstacle for preservation and then determined that the respondent had not met it.

The panel also misconstrued the factual record. It claimed that "the record reflects that the children's father lived in the home" and that the "respondent allowed the children's father to become the children's caregiver." *Id.* at ___; slip op at 6. But the record shows that at the relevant time the respondent was living separately from the children's father and told a CPS investigator that the children would not be safe in his home. Relying on this erroneous understanding of the record, the panel concluded that aggravated circumstances applied to the respondent because she had "placed DE 'at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk.' " *Id.*, quoting MCL 722.638(2).

The panel also misconstrued the law. MCL 712A.19a(2)(a) requires a judicial determination that aggravated circumstances exist before the Department is excused from making reasonable efforts. The trial court determined that aggravated circumstances *did not* exist as to the respondent. In fact, it continued to reiterate the need for reasonable efforts throughout the progression of this case.

The panel's conclusion that there were aggravated circumstances—based on a misunderstanding of the facts—cannot justify the Department's failure to make reasonable efforts. The Department agrees. Its joint motion filed in this Court concedes that it was required to make reasonable efforts all along and failed to do so. Because we agree with the Department that it was required to make reasonable efforts, we reverse the panel's decision in this case and remand the case to the trial court so that the Department may do so. The joint motion to remand this case to the trial court is DENIED as moot.

We do not retain jurisdiction.