

STATE OF MICHIGAN
COURT OF APPEALS

In re S. SHUKAIT-PIERCE, Minor.

UNPUBLISHED

October 7, 2021

No. 356512

Livingston Circuit Court

Family Division

LC No. 20-016098-NA

Before: STEPHENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Respondent appeals as of right the trial court’s order authorizing the removal of the minor child, SSP. We reverse and remand.

I. BACKGROUND

On January 28, 2020, the Department of Health and Human Services (DHHS) filed a petition requesting the removal of SSP from the home of her mother.¹ The petition noted that respondent was SSP’s putative father, and that he resided in a correctional facility. The trial court ordered that SSP be taken into protective custody and placed with DHHS. SSP’s mother signed an affidavit of parentage on January 30, 2020, and the petition was amended to add respondent as SSP’s legal father on January 31, 2020. In February 2020, the trial court held separate preliminary hearings for SSP’s mother and respondent, and the court entered orders authorizing the filing of the petition as to SSP’s mother and respondent. An adjudication hearing was held for SSP’s mother in February 2020; SSP’s mother admitted certain allegations in the petition, and the trial court found statutory grounds to exercise jurisdiction over SSP. In November 2020, the trial court held a bench trial regarding jurisdiction with respect to respondent.² In January 2021, the referee recommended that the child proceedings against respondent be dismissed on the basis that when

¹ SSP’s mother is not a party to this appeal, and the term “respondent” as used in this opinion refers only to respondent-father.

² Respondent’s jurisdiction trial was delayed until November 2020 because of COVID-19 precautions and respondent’s incarceration.

the initial petition was filed respondent was not considered a “parent” of SSP because he was a putative father. The referee noted that respondent only became a parent on January 30, 2021, a day before the amended petition was filed, and only had one day to make arrangements for SSP’s care. On January 25, 2021, the trial court ordered that the petition against respondent be dismissed and that SSP be released to respondent. Because respondent was incarcerated, SSP remained in placement with her foster parents.

On January 27, 2021, a foster care worker, Jennifer Weinman, sent respondent an update letter on SSP. The update letter included power of attorney documents she received from respondent’s attorney, which needed to be signed and notarized by respondent. She did not receive a response from respondent. On February 10, 2021, DHHS filed a supplemental petition against respondent requesting the removal of SSP. The petition alleged that respondent was currently in prison and could not provide for SSP. At respondent’s preliminary hearing, Weinman testified that respondent was incarcerated, that his earliest release date was in 2018, and that his maximum release date was in 2044. She further testified that respondent was incarcerated when SSP was born and SSP had never actually been in respondent’s physical care and custody. Weinman stated that SSP could not be returned to her mother or placed with respondent, and that she was placed with a licensed foster home.

Weinman testified that she had received some communication from Andrew Babnik, an attorney who represented GD and AD. Weinman testified that Babnik told her that GD and AD had been babysitters for SSP before she came into foster care. However, Weinman also testified that she communicated with SSP’s mother to verify that information, and that SSP’s mother was unaware who GD and AD were. Respondent also testified that GD and AD had never babysat SSP. According to respondent, GD and AD were family friends who had babysat for members of his family. Respondent testified that he received a letter from Weinman on February 12, 2021, with a power of attorney document that needed to be signed and notarized. He testified that he signed it, had it notarized, and placed it in the mail on the day of the hearing, February 16, 2021.

The referee found that there was probable cause for the trial court to find that SSP was without proper care and custody, and stated that she was going to authorize the petition. She also found that there were reasonable efforts to prevent removal. The trial court adopted the referee’s findings and entered an order authorizing the petition.

On appeal, respondent argues that reasonable efforts were not made to prevent SSP’s removal, the trial court erred by authorizing the petition, and that respondent’s due-process rights were violated.

II. STANDARD OF REVIEW

This Court reviews for clear error a trial court’s factual findings. *In re Williams*, 333 Mich App 172, 178; 958 NW2d 629 (2020). “Clear error requires that the reviewing court be left with a firm and definite conviction that a mistake has been made.” *Id.* (quotation marks and citation omitted). Generally, this Court reviews de novo whether a respondent’s due-process rights were violated during child protective proceedings. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). However, this Court reviews unpreserved constitutional issues for plain error affecting substantial rights. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009).

III. ANALYSIS

After conducting a preliminary investigation, DHHS may petition the family division of the circuit court to take jurisdiction over a child. *In re Ferranti*, 504 Mich 1, 15; 934 NW2d 610 (2019). The petition must contain “[t]he essential facts that, if proven, would allow the trial court to assume jurisdiction over the child.” *Id.* (quotation marks and citation omitted). After a trial court receives the petition, it must hold a preliminary hearing, and “may authorize the filing of the petition upon a finding of probable cause that one or more of the allegations are true and could support the trial court’s exercise of jurisdiction under MCL 712A.2(b).” *Id.* If the petition is authorized, the trial court must decide “whether the child should remain in the home, be returned home, or be placed in foster care pending trial.” *In re Benavides*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 352581); slip op at 3 (quotation marks and citation omitted). MCR 3.965(C)(2) provides, in relevant part:

Criteria. The court may order placement of the child into foster care if the court finds all of the following:

(a) Custody of the child with the parent presents a substantial risk of harm to the child’s life, physical health, or mental well-being.

(b) No provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from the risk as described in subrule (a).

(c) Continuing the child’s residence in the home is contrary to the child’s welfare.

(d) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.

(e) Conditions of child custody away from the parent are adequate to safeguard the child’s health and welfare.

See also MCL 712A.13a(9). “If the trial court orders placement of the child in foster care, it must make explicit findings that it is contrary to the welfare of the child to remain at home, MCR 3.965(C)(3), and reasonable efforts to prevent the removal of the child have been made or that reasonable efforts to prevent removal are not required, MCR 3.965(C)(4).” *Benavides*, ___ Mich App at ___; slip op at 3 (quotation marks omitted). The preponderance of the evidence standard applies when the trial court is not terminating the parent’s rights to a child. *Williams*, 333 Mich App at 183. A trial court is not required to “articulate extensive findings regarding every conceivable detail.” *Id.* “However, when a statute or court rule requires factual findings as to an enumerated list of factors, the trial court must make a record of its findings as to each and every factor sufficient for this Court to conduct a meaningful review.” *Id.*

A. REASONABLE EFFORTS

Respondent first argues that the agency failed to use reasonable efforts to prevent removal of SSP. We agree.

“In Michigan, procedures to ensure due process to a parent facing removal of his child from the home or termination of his parental rights are set forth by statute, court rule, DH[H]S policies and procedures, and various federal laws[.]” *In re Rood*, 483 Mich 73, 93; 763 NW2d 587 (2009). MCL 712A.18f(4) requires the court to state whether reasonable efforts were made to prevent the child’s removal from his or her home before entering an order of disposition. MCR 3.965(C)(4) provides that “[w]hen the court has placed a child with someone other than the custodial parent, guardian, or legal custodian, the court must determine whether reasonable efforts to prevent the removal of the child have been made or that reasonable efforts to prevent removal are not required.” See also *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (quotation marks omitted) quoting MCL 712A.19a(2) (“Reasonable efforts to reunify the child and family must be made in all cases except those involving aggravated circumstances not present in this case.”) These provisions are mirrored in the state plans for foster care in the United States Code³ and Code of Federal Regulations⁴.

Reasonable efforts is not defined by either statute or court rule. However, our courts have recognized it to include:

1. “[M]aking a referral for services and attempt[ing] to engage the family in services[.]” *In re JL*, 483 Mich 300, 322; 770 NW2d 853 (2009).

2. Creating “a service plan outlining the steps that both it and the parent will take to rectify the issues that led to court involvement[.]” *In re Hicks*, 500 Mich 79, 85–86; 893 NW2d 637 (2017), citing MCL 712A.18f(3)(d).

3. Identifying relatives who might be able to provide care for the children. *In re Rood*, 483 Mich at 107-109.

At a minimum, absent aggravated circumstances, reasonable efforts require pursuing, involving and considering respondent parents’ plans for the care and custody of their children.

DHHS’s Children’s Protective Services Manual (CPM) also requires CPS caseworkers to document reasonable efforts when filing a petition for removal. “If unable to provide reasonable efforts to the family to prevent the removal of the child, the CPS worker must document why it was not possible to provide reasonable efforts.”⁵ “Every removal must consider and evaluate

³ See 42 U.S.C. 671(15).

⁴ See 45 C.F.R. 1356.21(b).

⁵ Michigan Department of Health and Human Services, Children’s Protective Services Manual, PSM 715-2, p 2 <<https://dhhs.michigan.gov/OLMWEB/EX/PS/Public/PSM/715-2.pdf#pagemode=bookmarks>> (accessed September 12, 2021).

placement with the noncustodial parent, and other relatives.”⁶ When considering placement of the child with a noncustodial parent, DHHS is required to also complete a “Risk Assessment and Family Assessment of Needs and Strengths of the non-custodial parent’s household.”⁷

The record does not support the trial court’s finding that DHHS made reasonable efforts to prevent removal of SSP. On January 25, 2021, the court dismissed jurisdiction as to respondent and SSP was ordered released to respondent. Sixteen days later, on February 10, 2021, DHHS petitioned the court for removal of SSP from respondent. There was only one communication from DHHS during that time: a January 27, 2021 letter from Weinman to respondent that contained power of attorney documents. Assuming the January 27, 2021 letter was mailed the same day, DHHS allotted approximately 10 days for mail delivery to the Michigan Department of Corrections (MDOC), for the MDOC to distribute that mail to respondent, for respondent to sign and have the documents notarized, and for mail delivery back to DHHS. This amount of time, even without considering the challenges of incarceration and the coronavirus pandemic, was unreasonable. At the February 16, 2021 preliminary hearing on the supplemental petition for removal, respondent testified that he had only received Weinman’s letter the prior Friday, February 12, 2021 and could not mail documents signed and notarized until the day of the hearing, because Monday, February 15, 2021, was President’s Day and the mail did not run. This single attempt after the supplemental petition neither constituted reasonable efforts nor comported with due process.

B. REMOVAL

Respondent next argues that the trial court erred by finding that there was probable cause that the allegations in the petition fell within MCL 712A.2(b). We agree.

A trial court “may authorize the filing of the petition upon a finding of probable cause that one or more of the allegations are true and could support the trial court’s exercise of jurisdiction under MCL 712A.2(b).” *Ferranti*, 504 Mich at 15. MCL 712A.2⁸ provides, in relevant part:

The court has the following authority and jurisdiction:

* * *

⁶ Michigan Department of Health and Human Services, Children’s Protective Services Manual, PSM 715-2, p 6 <<https://dhhs.michigan.gov/OLMWEB/EX/PS/Public/PSM/715-2.pdf#pagemode=bookmarks>> (accessed September 12, 2021).

⁷ Michigan Department of Health and Human Services, Children’s Protective Services Manual, PSM 715-2, p 7 <<https://dhhs.michigan.gov/OLMWEB/EX/PS/Public/PSM/715-2.pdf#pagemode=bookmarks>> (accessed September 12, 2021).

⁸ MCL 712A.2 was amended, effective October 1, 2021, by 2021 PA 113. However, MCL 712A.2(b) will not be affected.

(b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:

(1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. As used in this subdivision:

* * *

(C) “Without proper custody or guardianship” does not mean a parent has placed the juvenile with another person who is legally responsible for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance.

MCL 700.5103(1) provides:

By a properly executed power of attorney, a parent or guardian of a minor or a guardian of a legally incapacitated individual may delegate to another person, for a period not exceeding 180 days, any of the parent’s or guardian’s powers regarding care, custody, or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward or to release of a minor ward for adoption.

A trial court is required to “examine the child’s situation *at the time the petition was filed.*” *In re MU*, 264 Mich App 270, 279; 690 NW2d 495 (2004) (emphasis added).

Under MCL 712A.13a(9)(b), a trial court may order a child to be placed in foster care only if it finds all of the conditions in subdivisions (a) through (e), including that “[n]o provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from risk as described in subdivision (a).” MCL 712A.13a(9)(b). Because MCL 712A.13a(9) requires factual findings for a list of enumerated conditions, the trial court was required to “make a record of its findings as to each and every factor sufficient for this Court to conduct a meaningful review.” See *Williams*, 333 Mich App at 183. The trial court did not explicitly make a finding that no service or arrangement except removal was reasonably available to adequately safeguard SSP, rather it noted that respondent was incarcerated and there were no proper care and custody arrangements.

While there was no power of attorney in effect on February 10, 2021, there were multiple attempts by respondent to provide SSP proper care and custody. DHHS had received four communications between February 1st and February 5th from counsel representing GD and AD who were family friends selected by respondent to care for SSP during respondent’s incarceration. Based on these communications, DHHS forwarded respondent power of attorney documents and was awaiting a response. At the preliminary hearing, respondent testified confirming his intent to create a power of attorney, and his agreement to either a guardianship with GD and AD, or to

planning with the current foster parents. We find this evidence negates a finding under MCL 712A.2(b)(1) that respondent neglected or refused to provide proper care or custody. Accordingly, we reverse the order authorizing the petition for removal and remand for further proceedings to address the power of attorney issue.

C. DUE PROCESS

Respondent argues that his due-process rights were violated because the foster care agency “thwarted” his attempt to provide for SSP’s care and custody. We disagree.

“It is well established that parents have a significant interest in the companionship, care, custody, and management of their children.” *Williams*, 333 Mich App at 179 (quotation marks and citation omitted). That interest is protected by due process. *Id.* “Procedural due process requires notice and a meaningful opportunity to be heard before an impartial decision-maker.” *In re TK*, 306 Mich App 698, 706; 859 NW2d 208 (2014). Substantive due process grants the right against an “arbitrary deprivation of liberty or property interests.” *Id.* Essentially, “due process requires fundamental fairness.” *Id.*

Respondent argues that the agency thwarted the placement of SSP with his chosen caregivers and then alleged that he had not provided for SSP’s care and custody to claim that he neglected SSP. “[A] state may not, consistent with due process of law, create the conditions that will strip an individual of an interest protected under the due process clause.” *In re B & J*, 279 Mich App 12, 19; 756 NW2d 234 (2008) (quotation marks and citation omitted). The agency did not create the conditions of respondent’s incarceration. Further, there is no evidence that the agency thwarted respondent’s attempt to execute a power of attorney. Weinman testified that she sent power of attorney documents to respondent on January 27, 2021. Although respondent testified that he did not receive that letter until February 12, there is no evidence that the agency was the cause of that delay.

We reverse the trial court’s order of removal and remand for further proceedings consistent with this opinion, including the vetting of any persons who may be nominated by respondent as a guardian for SSP. On remand, respondent shall be appointed new counsel and afforded time to execute the power of attorney or to nominate a guardian for SSP’s care and custody. We retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

Court of Appeals, State of Michigan

ORDER

In re S Shukait-Pierce Minor

Docket No. 356512

LC No. 20-016098-NA

Cynthia Diane Stephens
Presiding Judge

Stephen L. Borrello

Elizabeth L. Gleicher
Judges

The trial court's order of removal is REVERSED. This case is REMANDED to the trial court for proceedings consistent with the accompanying opinion including the vetting of any persons who may be nominated by respondent as a guardian for SSP. On remand, respondent shall be appointed new counsel and afforded time to execute the power of attorney or to nominate a guardian for SSP's care and custody. Proceedings on remand are limited to these issues. We retain jurisdiction.

Respondent shall initiate the proceedings on remand within 14 days of the date of this order. The time for further proceedings in this appeal shall begin to run on the issuance of an order in the trial court that concludes the remand proceedings. However, if respondent fails to file a motion to initiate the proceedings within the time provided, the time for further proceedings in this appeal shall begin to run at the conclusion of that 14-day period.

The trial court shall hear and decide the matter within 56 days of the date of this order and shall make an appropriate determination on the record. The trial court shall order a transcript of any hearing on remand to be prepared at public expense and filed within 21 days after completion of the proceedings.

/s/ Cynthia Diane Stephens
Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

October 7, 2021
Date


Chief Clerk