

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-CA-00149-COA

IN THE INTEREST OF K.M., A MINOR: K.F.M.

APPELLANT

v.

**JACKSON COUNTY YOUTH COURT AND
JACKSON COUNTY DEPARTMENT OF CHILD
PROTECTION SERVICES**

APPELLEES

DATE OF JUDGMENT: 12/17/2018
TRIAL JUDGE: HON. SHARON WILLIS SIGALAS
COURT FROM WHICH APPEALED: JACKSON COUNTY YOUTH COURT
ATTORNEYS FOR APPELLANT: KELLY GUNTER WILLIAMS
ANDRE DE GRUY
ATTORNEYS FOR APPELLEES: MICHAEL WILSON BRELAND
TONYA MICHELLE BLAIR
NATURE OF THE CASE: CIVIL - CUSTODY
DISPOSITION: AFFIRMED - 12/01/2020
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE BARNES, C.J., GREENLEE AND WESTBROOKS, JJ.

WESTBROOKS, J., FOR THE COURT:

¶1. Based upon the abuse and neglect of her two siblings, K.M. was found to be a neglected and abused child under the doctrine of anticipatory neglect. After a finding of aggravated abuse, the youth court found that reunification efforts were not necessary. Aggrieved, K.M.'s mother, K.F.M., appeals.

FACTS

¶2. K.F.M. has three minor children: J.M., born in February 2013, Z.M., born in August 2017, and K.M., born in July 2018. The two older children were taken into custody by the

Jackson County Department of Child Protection Services (CPS) on February 1, 2018. Custody with CPS was based upon allegations of abuse and neglect. A petition was filed on February 15, 2018, listing three counts each for J.M. and Z.M. On March 16, 2018, the prosecutor filed a motion to bypass reasonable efforts toward reunification. The medical evidence and testimony showed that the two children had been subjected to a pattern of neglect and abuse. Specifically, Z.M. had numerous non-accidental traumatic injuries, including broken bones and severe malnutrition. As a result of the abuse and resulting injuries that were ignored by K.F.M., Z.M. sustained a fractured left arm that resulted in a severe deformity and other permanent injuries. Dr. Tyler Sexton stated that Z.M.'s failure to thrive resulted from chronic abuse.

¶3. On June 13, 2018, after receiving notice of the State's intent to seek a reasonable-efforts bypass, K.F.M. filed a motion to enter a plea of no contest to the allegations outlined in the petition. K.F.M.'s plea was entered on June 27, 2018.

¶4. On July 31, 2018, CPS was advised that K.F.M. had given birth to K.M. On August 1, 2018, K.M. was placed in CPS's custody based upon the neglect of K.F.M.'s other two minor children under the theory of anticipatory neglect. That same day, Denise Lee was appointed as K.M.'s guardian ad litem (GAL).

¶5. On August 9, 2018, the Jackson County Youth Court adjudicated J.M. and Z.M. as abused and neglected children as to all counts in the petition. Regarding the State's motion to bypass reasonable efforts, the court found that Z.M. was a chronically abused and tortured child. The court further found aggravated circumstances as to K.F.M. As a result, CPS was

granted a reasonable-efforts bypass regarding K.F.M. It was made clear at this time that CPS intended to seek termination of parental rights as to J.M. and Z.M.

¶6. Additionally, the court had a shelter hearing regarding K.F.M.'s newborn child, K.M. The permanent plan accepted for K.M. was custody with a relative or termination of parental rights. The court found that reasonable efforts were not necessary due to the "history of this case." It was communicated on the record that both the GAL and prosecutor intended to request a bypass of reasonable efforts toward reunification. The request was to be based upon the facts of the case involving K.M.'s siblings.

¶7. The prosecutor filed a petition on August 15, 2018, alleging that K.M. was an abused and neglected child based upon the facts surrounding K.M.'s siblings. K.F.M. entered a plea of denial. After a full evidentiary hearing on October 15, 2018, K.M. was adjudicated as an abused and neglected child based upon the theory of anticipatory neglect.

¶8. At the December 4, 2018 disposition hearing for all three minor children, the record shows that the GAL and the prosecutor intended to seek an aggravated-circumstances finding as to K.M. The matter was continued to determine if the motion needed to be presented in writing. On December 17, 2018, based upon the prosecutor's oral motion, the court held that reasonable efforts to reunify K.M. with her parents were not required because aggravated circumstances existed regarding the treatment of K.M.'s siblings by her parents. The permanency plan of termination of parental rights and adoption was approved for K.M. Aggrieved, K.F.M. appeals.

STANDARD OF REVIEW

¶9. In youth court proceedings, the appellate standard of review is the same as we apply to appeals from chancery court. *E. K. v. Miss. Dep't of Child Protection Servs.*, 249 So. 3d 377, 381 (¶16) (Miss. 2018). Questions concerning law are reviewed de novo. *Id.*

DISCUSSION

¶10. On appeal, K.F.M. argues that the youth court erred in failing to require notice of the State's intent to bypass reasonable efforts of reunification pursuant to Mississippi Code section 43-21-603(7)(c)(i) (Rev. 2015), which states that "reasonable efforts to maintain the child within his or her home shall not be required if the court determines that: [t]he parent has subjected the child to aggravated circumstances[.]" Specifically, K.F.M. argues she did not receive proper notice because the State's motion was not made in writing.

¶11. K.F.M. cites no authority for her contention that a finding of aggravated circumstance must be requested in writing. A reading of section 43-21-603(7)(c)(i) makes no mention of any requirement that a motion be made, orally or in writing, prior to a youth court's finding of aggravated circumstances. Aggravated circumstances are one of the justifications a youth court judge may consider when determining that re-unification efforts will not be required. Meaning, a motion does not have to be made; it is simply one of the remedies available to the court by statute. The only question for review, which K.F.M. has not raised, would be whether the court's order was supported by the law and facts.

¶12. While we find no Mississippi caselaw addressing whether the youth court must receive a motion for aggravated circumstances in writing, or at all, prior to such a determination, we have addressed anticipatory neglect. In *In re N.M. v. Miss. Dep't of*

Human Servs., 215 So. 3d 1007 (Miss. Ct. App. 2017), this Court acknowledged anticipatory neglect as a valid doctrine. Specifically, this Court stated:

Therefore, we believe that in a case involving evidence of neglect of a sibling, the supreme court would adopt the doctrine of anticipatory or potential neglect, especially where the neglect of a sibling had been determined a mere month prior to the other child’s birth. Moreover, we find our Youth Court Act’s definition of a ‘neglected child’ is sufficiently comprehensive to include a newborn child whose parents have previously demonstrated that they are unwilling or unable to provide proper care for the child.

Id. at 1013 (¶15). Similarly, in *T.T. v. Harrison County*, 90 So. 3d 1283, 1287 (¶20) (Miss. Ct. App. 2012), this Court held that “sufficient evidence documents the abuse of T.T.’s siblings. Based on this evidence, the potential harm to T.T. warrants his removal from the environment.” *See also In re E.S.*, 567 So. 2d 848, 850-51 (Miss. 1990) (affirming the youth court’s finding that the siblings of a child who had been abused were also neglected and abused children within the meaning of the Youth Court Act).

¶13. In the case sub judice, the youth court based its finding of aggravated circumstances correctly upon the neglect and abuse of K.M.’s siblings. K.F.M. entered a plea of no contest to the allegations against the other two siblings. The evidence of abuse was more than sufficient regarding K.M.’s siblings. The youth court had statutory authority to make such a determination at the disposition hearing. As such, the order of the youth court is affirmed.

¶14. **AFFIRMED.**

BARNES, C.J., CARLTON AND WILSON, P.JJ., GREENLEE, McDONALD AND LAWRENCE, JJ., CONCUR. McCARTY, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION, JOINED IN PART BY WESTBROOKS AND McDONALD, JJ.

McCARTY, J., SPECIALLY CONCURRING:

¶15. I agree that under the unique circumstances presented in this appeal, we should affirm. I write separately to emphasize the importance of due process when the State seeks to establish “aggravated circumstances” because bypassing the efforts to keep a child with a parent can be a significant step toward the termination of parental rights.

¶16. State law sets out that “[r]easonable efforts to maintain the child within his home shall not be required if the court determines that . . . [t]he parent has subjected the child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse and sexual abuse,” among other situations, as when “[t]he parental rights of the parent to a sibling have been terminated involuntarily[.]” Miss. Code Ann. § 43-21-603 (7)(c)(i), (iii). “Once the reasonable efforts requirement is bypassed,” the trial court may conduct a permanency hearing. *Id.* § 43-21-603(c).

¶17. Of course, if reunification is bypassed—for such “aggravating circumstances” as set out in the subsection, the next step is often termination of parental rights, which happened in this case.

¶18. For many decades, courts have recognized that “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.” *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). “Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.” *Id.* “If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention

into ongoing family affairs.” *Id.*

¶19. As a result, “[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.” *Id.* at 753-54.

¶20. The infant who is the subject of this appeal had been in the custody of the State since birth, and was not subject to the direct and indirect abuse suffered by the other two children. That fact is not in dispute. The question is only whether the State used proper procedures to warn the mother that the “bypass” of aggravated circumstances was going to be applied to her relationship with K.M.

¶21. It was first during a hearing on December 4 when the mother and her counsel learned the State would ask for an “aggravating circumstances” finding regarding K.M. Counsel for the mother stated, “I don’t see where we were noticed that [the State] was filing on [K.M.] at all with regard to the mother or [father].” In response, the State argued that the prior findings as to the other children “applies to [K.M.] also.” The trial court then asked the mother’s counsel if a written motion were required prior to “disposition for aggravated circumstances[.]” The mother’s counsel responded that that would be “appropriate” because it was a hearing involving the disposition. The State declined and only made an ore tenus motion to apply an aggravated-circumstances finding to K.M.

¶22. The trial court did not immediately rule, but instead reset the disposition several days later. Despite the trial court’s delay of the hearing and the concern expressed by the counsel for the mother, the State did not file a written motion to explicitly seek the bypass as to K.M. On December 17, the trial court granted the State’s prior ore tenus request to apply the bypass

to K.M.

¶23. While on appeal the mother argues that she was “robbed . . . of the opportunity to prepare and defend against the State’s request to bypass,” the extended timeline drained any surprise out of the proceedings. Furthermore, there were no new facts as to abuse or neglect; those facts had already been litigated regarding the two other children, as K.M. was never subjected to any direct or indirect abuse. The mother was also represented by counsel the entire time. While the majority does not reach this precise conclusion, the record shows that the mother was not deprived of due process en route to the termination of her parental rights.

¶24. Nonetheless, keeping the ideals of *Santosky* in mind, K.M.’s mother had a “more critical need for procedural protections[.]” So it would have been the best course for the State to make a motion in writing that it was seeking to establish aggravated circumstances. Had the State simply prepared and filed such a motion, there would be no concern at all whether the mother had suffered a deprivation of process, and there would be no basis for an appeal.

¶25. In a “bypass” case like this one, the State should file a written motion that it is seeking to establish aggravated circumstances pursuant to Miss. Code Ann. § 43-21-603(7)(c), and the subsection(s) it seeks to establish as a basis for bypass of reunification. This motion would satisfy due process concerns, which are focused on the parents’ rights and also track the bypass law, which allows the State to safeguard children who are at risk.

WESTBROOKS AND McDONALD, JJ., JOIN THIS OPINION IN PART.