

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of L.D.R. and A.D.T., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MARVIN THOMAS,

Respondent-Appellant,

and

MICHELLE ANNETTE RICHARDSON and
DONALD T. OLIVER,

Respondents.

UNPUBLISHED

August 2, 2002

No. 236971

Wayne Circuit Court

Family Division

LC No. 00-390821

Before: Murray, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(a)(ii), (g), and (j). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Respondent first argues that he was denied due process because he did not receive proper notice of the termination hearings pursuant to MCL 712A.19b(2)(c). Respondent did not raise this due process issue below and therefore has not preserved it for appellate review. According to *People v Carines*, 460 Mich 750, 773-774; 597 NW2d 130 (1999), an unpreserved, constitutional error merits reversal only if it was "a plain error that affected substantial rights." To show that substantial rights were affected, the respondent must show "prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* at 763.

Based upon a review of the record, it appears that respondent was not properly notified of the beginning of the termination proceedings. By the time that respondent was personally served written notice of the permanent custody hearings, at least one substantive hearing wherein

witnesses testified had occurred. However, while there may have been irregularities in the notice provided, respondent has not demonstrated that he was prejudiced by these irregularities.

The testimony during respondent's absence was related solely to respondents Richardson and Oliver. This testimony had no bearing or relevancy to the grounds that were relied upon to terminate respondent's parental rights. Respondent's parental rights were terminated because of his inability to care for his daughter due to his incarceration. Respondent had ample opportunity to explore this issue at the hearing on July 11, 2001. Furthermore, respondent's counsel had the opportunity once appointed to review the record of the missed testimony and could have asked to recall the witnesses in question if there were any concerns. Counsel knew the posture of the case and proceeded accordingly. Respondent is not allowed to assign as error on appeal something which his own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute. *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW 2d 705 (1989).

Next, respondent argues that he was denied due process because his attorney was not present at several hearings, including the initiation of the termination hearing. Again, respondent did not raise this issue below, consequently, he must show that he suffered plain error that affected his substantial rights. *Carines, supra* at 774.

In a child protective proceeding, MCR 5.915(B)(1) mandates the appointment of counsel for indigent parents. However, the court rule requires affirmative action on the part of the parent to trigger the appointment and continuation of appointed counsel. *In re Hall*, 188 Mich App 217, 218; 469 NW2d 56 (1991). Respondent never appeared to request counsel at the hearings in which he was unrepresented. But, as discussed above, this was because he had no knowledge of the permanent custody proceedings until they had already begun. Thus, resolution of the issue of whether respondent was denied the right to counsel, depends upon whether proper notice of the proceedings was provided.

As indicated above, respondent was not given proper written notice of the proceedings. Because respondent was not properly notified of the permanent custody proceedings until they were underway, he could not waive the right to counsel under MCR 5.915(B)(1). However, the analysis does not end there.

As with the analysis of Issue I, because respondent's claim of error is an unpreserved, constitutional error, he must also show that he was prejudiced by the absence of his counsel at those prior proceedings. *Carines, supra* at 773-774. For the reasons set forth above, we conclude that respondent cannot make such a showing.

Respondent has failed to show that he was prejudiced by plain error. Therefore, reversal is not required. *Carines, supra* at 763-764.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Brian K. Zahra