STATE OF MICHIGAN

COURT OF APPEALS

In re RESKE, Minors.

UNPUBLISHED
July 26, 2016

No. 330444
Wayne Circuit Court
Family Division
LC No. 06-450092-NA

Before: WILDER, P.J., and MURPHY and O'CONNELL, JJ.

PER CURIAM.

Respondent-mother, A. Koehler, appeals as of right an order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(f) (children subject to guardianship in conjunction with parent's failure to support and visit for two-year period). We affirm.

The children were previously subject to a child protective proceeding from January 2006 until March 2007. In 2011, the children began living with petitioner, their maternal grandmother, pursuant to a guardianship. In July 2015, petitioner filed a petition requesting that the court terminate respondent's parental rights pursuant to MCL 712A.19b(3)(f) on the basis of the existing guardianship and the fact that for at least two years before the filing of the petition, respondent had failed to regularly support the children and to visit or communicate with them.[1] After a termination hearing on November 19, 2015, the circuit court terminated respondent's parental rights.

I. DUE PROCESS AND ADJOURNMENT REQUEST

We first address respondent's contention that her right to due process was violated because she was not provided with proper notice of the permanent custody petition and termination hearing, although petitioner allegedly possessed respondent's contact information. Respondent also complains that the circuit court erred in denying her motion to adjourn the

[1] Guardians are specifically identified under MCR 3.977(A)(2)(c) and MCL 712A.19b(1) as having standing to pursue a termination petition.

termination hearing.[2] Respondent did not raise in the circuit court a due process objection, rendering that issue unpreserved for appellate review. We review the unpreserved due process issue for plain error affecting respondent's substantial rights. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009).

Respondent has failed to substantiate a due process violation. Procedural due process generally requires that a party receive a meaningful "opportunity to be heard," along with notice of the opportunity to be heard. *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009). An elementary and fundamental component of due process with respect to a proceeding in which finality will be accorded is notice that is reasonably calculated, under all of the circumstances, to apprise an interested party of the pendency of the action and of any associated hearing. *Id.* In light of the fundamental nature of a parent's rights involving his or her child, Michigan court rules and statutes contain provisions designed to protect the parent's right to due process in child protective proceedings. *Id*. at 91-102; see MCR 3.977(C)(1), MCR 3.920(B) and (D), and MCL 712A.13. Respondent does not acknowledge any of the pertinent court rules or statutes touching on notice in child protective proceedings, let alone frame an argument under a court rule or statute. Instead, respondent merely presents her argument in broad terms of constitutional due process; therefore, due process, and not any court rule or statute, will be the focus of our analysis.

Again, respondent maintains that she did not receive proper notice of the termination petition and hearing. The 2015 petition listed respondent's address as unknown, and there is no indication in the record that petitioner attempted to serve respondent with the petition. At a September 22, 2015 preliminary hearing, respondent did not appear. Petitioner advised the court that she did not know respondent's whereabouts or location. The circuit court scheduled a termination hearing for October 27, 2015. On order of the circuit court, a notice of the October 27, 2015 hearing was published in the *Detroit Legal News*. The order for publication and the notice itself mistakenly indicated that the hearing concerned a guardianship petition and not a termination petition; however, the notice did warn that the hearing might result in the termination of parental rights. On October 27, 2015, the date of the scheduled hearing, petitioner informed the circuit court that she had received contact information for respondent. The court called respondent's telephone number, left her a message advising her of the court's telephone number and the scheduled termination hearing, and asked her to call that day. The circuit court agreed to reschedule the termination hearing for November 19, 2015, and expressed its intent "to get . . . notice to [respondent's] . . . address in Lansing," advise her of the rescheduled hearing date if she returned the phone message, and to appoint counsel for her. The record reflects that on October 28, 2015, the circuit court sent respondent, by regular and certified mail using the Lansing

[2] Neither respondent's due process argument nor her adjournment argument is set forth in her appellate brief in the statement of questions involved on appeal, MCR 7.212(C)(5), thereby waiving those issues for consideration. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Nevertheless, we shall engage in a substantive review of the issues.

address, notice of the November 19, 2015 termination hearing, attaching a copy of the termination petition.

When the November 19, 2015 termination hearing began, the circuit court recounted that after the October 2015 hearing had concluded, respondent called the court, she confirmed her mailing address in Lansing, the court appointed counsel to represent respondent, counsel spoke with respondent regarding the petition's allegations, and the court informed her of the November 19, 2015 hearing date. Respondent's counsel concurred in the circuit court's summary of these events. Additionally, respondent's counsel, who had spoken by phone with respondent back in October and again on the day before the termination hearing, informed the court that counsel had made respondent aware of the allegations in the petition and of the scheduled termination hearing, that respondent was in Nevada seeking employment, and that respondent wished to participate in the termination hearing by phone. Despite respondent's request for phone participation, when the court and counsel called respondent for purposes of having her participate in the hearing by speaker phone, respondent did not answer her phone. On appeal, respondent provides no explanation or excuse with regard to why she had been unavailable by phone.

On this record, which establishes without dispute, by way of personal conversations weeks before the termination hearing, that respondent had direct, actual, and timely notice from her attorney and the circuit court itself of the allegations in the petition and of the termination hearing, there is simply no basis to find a due process violation. The trial court's efforts were reasonably calculated to timely apprise respondent, and indeed did timely apprise her, of the termination petition and hearing. Respondent had an opportunity to be heard, but she chose not to avail herself of that opportunity. Reversal is unwarranted.

Respondent also argues that the circuit court erred in denying her motion for a continuance. Respondent's counsel requested an adjournment so that she could investigate the existence of telephone records potentially documenting that respondent had tried calling petitioner to contact the children. The circuit court denied the request. We review for an abuse of discretion a circuit court's adjournment ruling. *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). An abuse of discretion "occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

In a child protective proceeding, a motion to adjourn must identify good cause, and the court's ruling should take into account the best interests of the child. MCR 3.923(G)(1) and (2). The court rule applicable to adjournments in general specifies that the unavailability of a witness or evidence can form a basis to adjourn, but "only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence." MCR 2.503(C)(2).

Respondent's counsel asked for an adjournment so that she or respondent could seek evidence of some phone calls respondent had allegedly made "to contact [petitioner] to see the kids." Respondent's counsel acknowledged that respondent had tried obtaining the information "just a few days ago," without success. The court briefly adjourned the hearing to attempt to contact respondent. Respondent's counsel twice unsuccessfully tried calling respondent's phone

number, leaving her a message with the court clerk's phone number. The court then denied the adjournment, but it indicated that if respondent phoned in during the hearing, the court would take her testimony.

The circuit court acted within its discretion in denying the motion to adjourn. *Soumis*, 218 Mich App at 32. Although the evidence may perhaps have been material for purposes of MCL 712A.19b(3)(f)(*ii*), which requires a regular and substantial failure to visit, contact, or communicate for a two-year period before a petition is filed, there is nothing in the record revealing any statutorily-pertinent details about the alleged phone calls to petitioner. For instance, we have no information regarding the general number of calls, the approximate dates of the calls, and the specific nature of the calls, and respondent could have given the court this information had she participated in the hearing by phone, if only to seek an adjournment. Also, phone records were not necessarily required to prove the calls, as respondent, if she had been present by phone at the hearing, could have testified about the phone calls, and phone records themselves would not have revealed the nature of any calls. Moreover, respondent's counsel essentially admitted that neither she nor respondent had diligently sought to produce the evidence. MCR 2.503(C)(2). No good cause existed for the adjournment. MCR 3.923(G).

II. STATUTORY GROUND FOR TERMINATION AND BEST INTERESTS

Respondent next asserts that because petitioner prevented her from contacting the children, the circuit court erred in relying on the lack of contact as a ground for termination. Respondent also argues that termination of her parental rights did not serve the children's best interests. If a trial court finds that a single statutory ground for termination has been established by clear and convincing evidence and that it has been proved by a preponderance of the evidence that termination of parental rights is in the best interests of a child, the court is mandated to terminate a respondent's parental rights to that child. MCL 712A.19b(3) and (5); *In re Moss,* 301 Mich App 76, 90; 836 NW2d 182 (2013); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). "This Court reviews for clear error the trial court's ruling that a statutory ground for termination has been established and its ruling that termination is in the children's best interests." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011); see also MCR 3.977(K). "A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). In applying the clear error standard in parental termination cases, "regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

A court may terminate parental rights under MCL 712A.19b(3)(f) under the following circumstances:

> The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8206, and both of the following have occurred:
>
> (*i*) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and

> substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.
>
> (*ii*) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition.

Petitioner testified that for at least two years before July 2015, respondent had entirely failed to provide the children with monetary or other support, although respondent had no apparent mental or physical infirmities that prevented her from working. MCL 712A.19b(3)(f)(*i*). Petitioner also testified that for at least two years before July 2015, respondent had not visited the children and had only sporadically contacted them by telephone. MCL 712A.19b(3)(f)(*ii*). Respondent's sporadic telephone contacts with the children do not qualify as substantial contacts. See *In re Martyn*, 161 Mich App 474, 482-483; 411 NW2d 743 (1987). Respondent offered no evidence of either regular support or contact, or of petitioner's disallowance of her contact with the children. Compare *In re ALZ*, 247 Mich App 264, 272-274; 636 NW2d 284 (2001).[3] The trial court did not clearly err in finding that the requirements of MCL 712A.19b(3)(f) were established by clear and convincing evidence.

With respect to the children's best interests, in *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014), this Court stated:

> The trial court should weigh all the evidence available to determine the children's best interests. To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [Citation and quotation marks omitted.]

We detect no clear error in the circuit court's conclusion that termination of respondent's parental rights would serve the children's best interests. Petitioner testified that she loved the children, had provided them with good care since at least 2011, and intended to continue caring

[3] With respect to respondent's argument that it was petitioner's actions and conduct that precluded her from visiting and contacting the children, there was no supporting evidence for the assertion, respondent failed to participate in the hearing by phone in which she could have voiced the claim, and respondent fails to provide any timeframe reflecting that the alleged circumvention by petitioner occurred before the petition was filed, which is the only relevant timeframe under MCL 712A.19b(3)(f)(*ii*).

for them. The evidence established that petitioner and the children shared a bond, and petitioner could provide the children with proper care and custody. The children had lived with petitioner in a guardianship since approximately 2011, and they had not seen respondent for more than two years. The children were in need of the permanency and stability that termination could provide. The trial court did not clearly err in finding that termination of respondent's parental rights was in the children's best interests.[4]

Affirmed.

/s/ Kurtis T. Wilder
/s/ William B. Murphy
/s/ Peter D. O'Connell

[4] Respondent makes a cursory argument that petitioner failed to provide reunification services. We conclude that the issue is waived because it is inadequately briefed. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Moreover, the language in MCL 712A.13a and MCL 712A.18f concerning case service plans obligates the "agency" to compose and execute those plans, and the statutory definition of "agency" does not encompass a guardian, MCL 712A.13a(1)(a). Finally, assuming that a guardian who pursues a termination petition must somehow provide reunification services, as opposed to the typical scenario involving the Department of Health and Human Services, termination was the goal at the outset of this case, so reunification services were not required. *In re HRC*, 286 Mich App at 463.