[Cite as *In re C.B.*, 2020-Ohio-5151.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

IN THE MATTER OF:	:	
C.B., T.J. and N.J.	:	CASE NO. 20CA3714, 20CA3715 and 20CA3716
	:	
Adjudicated Abused and Dependent Children	:	DECISION & JUDGMENT ENTRY

APPEARANCES:

Chase B. Bunstine, Chillicothe, Ohio, for Appellant[1].

Jeffrey Marks, Ross County Prosecuting Attorney, and Jennifer Ater, Assistant Prosecuting Attorney, Chillicothe, Ohio, for Appellee.

CIVIL CASE FROM COMMON PLEAS COURT, JUVENILE DIVISION
DATE JOURNALIZED: 10-22-20
Abele, J.

{¶ 1} This is an appeal of a Ross County Common Pleas Court, Juvenile Division, judgment that granted South Central Ohio Job & Family Services (JFS), appellee herein, permanent custody of C.B., T.J., and N.J., the biological children of Stacey Blevins, appellant herein.

{¶ 2} Appellant assigns one error for review:

> "THE MOTHER AND/OR FATHER WERE DENIED DUE PROCESS SINCE NEITHER PARENT WERE PROVIDED WITH NOTICE OF HEARINGS, INCLUDING NOTICE OF THE

[1] Different counsel represented appellant during the trial court proceedings.

> FINAL PRE-TRIALS AND FINAL HEARING ON PERMANENT CUSTODY, AS WELL AS COPIES OF OTHER COURT FILINGS AND ORDERS, INCLUDING MAGISTRATE'S DECISIONS AND JOURNAL ENTRIES, AFTER THE STATE INCORRECTLY UPDATED THE PARENTS' ADDRESS WITH THE COURT ON NOVEMBER 8, 2019."

{¶ 3} On October 31, 2019, the State of Ohio, appellee herein, filed a motion for permanent custody of C.B., born June 11, 2009, T.J., born April 25, 2011, and N.J., born October 26, 2018. The Ross County Sheriff's Department personally served appellant with the permanent custody motion at 1188 Sidney Street, Columbus, Ohio 43201. On November 8, 2019, appellee filed a Notice of Filing that requested that the court update the parents' address to 1187 Sidney Street, Columbus, Ohio 43201.

{¶ 4} On January 6, 2020, the trial court held the initial pretrial hearing on the permanent custody motion. The summons that accompanied the October 31, 2019 permanent custody motion (sent to the correct address) included the January 6 hearing date. The trial court sent notice of the second pretrial hearing to appellant at the newly updated incorrect address and the notice was returned as undeliverable. On February 3, 2020, the court held the second pretrial hearing. Appellant did not attend the second pretrial on February 3, 2020, but her attorney attended, and the court informed counsel of the date for the final permanent custody hearing.

{¶ 5} Subsequently, the trial court mailed notice of the final dispositional hearing to appellant at the incorrect address and the notice was returned as undeliverable. The trial court held the final hearing on March 3, 2020. Although appellant's counsel attended the entire hearing, appellant arrived at the hearing approximately one hour late. The court did, however, permit appellant to participate and to testify at the final hearing.

{¶ 6} On March 31, 2020, the trial court determined that appellee had proven, by clear and convincing evidence, that it is in the children's best interest to grant the permanent custody motion. This appeal followed.

{¶ 7} In her sole assignment of error, appellant asserts that "[t]he mother and/or father were denied due process since neither parent were provided with notice of hearings, including notice of the Final Pre-Trials and Final Hearing on Permanent Custody, as well as copies of other court filings and orders, including Magistrate's Decisions and Journal Entries, after the State incorrectly updated the parents' address with the Court on November 8, 2019."

{¶ 8} Initially, we recognize and emphasize that "parents' interest in the care, custody, and control of their children 'is perhaps the oldest of the fundamental liberty interests recognized by this Court.'" *In re B.C.*, 141 Ohio St.3d 55, 2014-Ohio-4558, 21 N.E.3d 308, ¶ 19, quoting *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Indeed, the right to raise one's "child is an 'essential' and 'basic' civil right." *In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990); *accord In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997); *see Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *In the Matter of B.L.O.*, 4th Dist. Jackson No. 19CA1, 2019-Ohio-2062, ¶ 12. Therefore, "parents who are 'suitable' have a 'paramount' right to the custody of their children." *B.C.* at ¶ 19, quoting *In re Perales*, 52 Ohio St.2d 89, 97, 369 N.E.2d 1047 (1977), citing *Clark v. Bayer*, 32 Ohio St. 299, 310 (1877); *Murray*, 52 Ohio St.3d at 157, 556 N.E.2d 1169.

{¶ 9} In addition, the Supreme Court of Ohio has described the permanent termination of parental rights as "' the family law equivalent of the death penalty in a criminal case.'" *Hayes*, 79 Ohio St.3d at 48, 679 N.E.2d 680, quoting *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45

(6th Dist.1991). Consequently, courts must afford parents facing the permanent termination of their parental rights "'every procedural and substantive protection the law allows.'" *Id.*, quoting *Smith* at 16, 601 N.E.2d 45; *accord B.C.* at ¶ 19. Thus, because parents possess a fundamental liberty interest in their children's care and custody, the state may not deprive parents of their parental rights without due process of law. *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467, ¶ 16, *e.g.*, *In re A.G.*, 4th Dist. Athens No. 14CA28, 2014-Ohio-5014, ¶ 12; *In re M.H.*, 4th Dist. Vinton No. 11CA683, 2011-Ohio-5140, ¶ 49-50. Moreover, a parent's right to due process "does not evaporate simply because" that parent has "not been [a] model parent * * * or [has] lost temporary custody of their child to the State." *Santosky* at 753.

{¶ 10} The Due Process Clause of the Fifth Amendment to the United States Constitution, as applicable to the states through the Fourteenth Amendment, provides: "No person shall * * * be deprived of life, liberty, or property, without due process of law." But "[f]or all its consequence, 'due process' has never been, and perhaps can never be, precisely defined. * * * Rather, the phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty." *Lassiter v. Dept. of Social Servs. of Durham Cty., North Carolina*, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

{¶ 11} Although "due process" lacks a precise definition, courts have long held that due process requires both notice and an opportunity to be heard. *In re Thompkins*, 115 Ohio St.3d 409, 2007-Ohio-5238, 875 N.E.2d 582, ¶ 12, citing *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 708, 4 S.Ct. 663, 28 L.Ed. 569 (1884); *Caldwell v. Carthage*, 49 Ohio St. 334, 348, 31 N.E. 602 (1892). "An elementary and fundamental requirement of due process in any

proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *accord In re Thompkins* at ¶ 13.

{¶ 12} Following this requirement, the government must *attempt* to provide actual notice to interested parties if it seeks to deprive them of a protected liberty or property interest. *Dusenbery v. United States*, 534 U.S. 161, 170, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002). However, due process does not require that an interested party receive *actual* notice. *Id.* Further, a parent may waive the due process rights to notice and an opportunity to be heard. *D.H. Overmyer Co. Inc. of Ohio v. Frick Co.,* 405 U.S. 174, 185, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972). A waiver of constitutional rights is valid when an individual knowingly, intelligently, and voluntarily relinquishes a known right. *E.g., Maryland v. Shatzer*, 559 U.S. 98, 104, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010); *State v. D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶ 24. We also note that in parental-rights termination cases, "it is of utmost importance that the parties fully understand their rights and that any waiver is made with full knowledge of those rights and consequences which may follow." *Elmer v. Lucas Cty. Children Servs. Bd.,* 36 Ohio App.3d 241, 523 N.E.2d 540 (6th Dist.1987).

{¶ 13} Appellant asserts that she did not receive actual notice of pretrial hearings and the final permanent custody hearing. She urges this court to follow *In re F.L.*, 8th Dist. Cuyahoga No. 83536, 2004-Ohio-1255, and find that appellant was denied due process. In *F.L.,* neither mother nor father appeared at a March pretrial hearing. The trial court twice continued the pretrial hearing and provided ordinary mail notice of an April pretrial, but no notice of the May

pretrial. At the May pretrial, the court set an August trial date, but neither the agency nor the trial court provided notice to the mother of the new trial date. *Id.* at ¶ 6. The court, however, served the mother with the summons on the permanent custody motion and hearing and she appeared at an October hearing and waived defects in service. The agency argued that after the court properly notified the mother of the motion and the initial hearing and entered the trial date on its docket, it had no duty to provide actual notice of the May pretrial or the August trial. The Eighth District, however, noted that the juvenile court's docket is not easily accessible and highlighted that the court previously provided notice of a pretrial by postcard. Thus, the court held that "due process requires that notice of a trial date in a permanent custody hearing be provided, even if the party has previously appeared for a pretrial." *Id.* at ¶ 13.

{¶ 14} In the case sub judice, we find *In re F.L.* distinguishable. In *F.L.*, the trial court failed to provide notice of the final trial date, the mother failed to attend the final hearing, and the court proceeded in her absence. In the case at bar, although the notices and filings sent to appellant through ordinary mail were returned as undeliverable, appellant did attend the first pretrial hearing, her attorney attended the second pretrial hearing, and appellant attended the final hearing, albeit one hour late, and the court permitted appellant to participate and to testify. We find a later Eighth District case more analogous to the case at bar. In *In re D.H.*, 177 Ohio App.3d 246, 2008-Ohio-3686, 894 N.E.2d 364 (8th Dist.), the court agreed with the holding in *In re F.L., supra,* but distinguished it, and noted that the trial court failed to provide notice of the trial date to the unrepresented mother in *F.L.* In *D.H.*, however, the court found that the mother received notice of the permanent custody hearing because the court informed mother's counsel of the trial date and counsel relayed that information to the mother. *D.H.* at ¶ 35-36.

{¶ 15} In another constructive notice case, mother received personal service of the permanent custody motion and notice of the initial permanent custody hearing, but she failed to attend the hearing. *In re Lee P.*, 6th Dist. Lucas No. L-03-1266, 2004-Ohio-1976. Counsel communicated with the mother concerning her final permanent custody hearing, but she failed to attend the hearing. The court noted that R.C. 2151.414 requires only notice of the original hearing following a permanent custody motion filing. Afterward, "constructive notice of hearings is proper." *Id.* at ¶ 8, citing *In re Billingsley*, 3d Dist. Putnam Nos. 12-02-07 and 12-02-08, 2003-Ohio-344, at ¶ 8-10; *In re Starkey*, 150 Ohio App.3d 612, 2002-Ohio-6892, at ¶ 31, 37-39; *In re Brodzenski,* 5th Dist. Stark No. 1997CA00412, 1998 WL 753190 (Oct. 26, 1998). Thus, the Sixth District held that "[t]here was no lack of notice since [mother] received actual notice of her first permanent custody hearing and constructive notice of her final permanent custody hearing. Nothing more is required." *In re Lee P.*, *supra*, at ¶ 14.

{¶ 16} Generally, notice of new or rescheduled hearings is sent to the parent's attorney, as prescribed by Juv.R. 20. *In re Lee P.*, ¶ 8, citing *In re Starkey* at ¶ 37-39. A parent's attorney's statement to the court that he or she communicated with the parent, who failed to appear, proves that the parent had constructive notice of the permanent custody hearing. *In re Broadzenski*, *supra. See also, In re C.H.*, 3d Dist. Mercer No. 10-19-10, 10-19-11, 10-19-12, and 10-19-13, 2020-Ohio-716, ¶ 53 (court found sufficient notice when parties did not receive actual notice of the permanent custody hearing, but the court held that they were aware that the case was ongoing and caseworker testified that she had informed them of the permanent custody hearing). In the case at bar, appellant received constructive notice of at least two of the three hearings because she attended them.

{¶ 17} Moreover, a parent's right to be present at a custody hearing is not absolute. *In re M.W.*, 8th Dist. Cuyahoga No. 103705, 2016-Ohio-2948, ¶ 10, citing *In re C.G.*, 9th Dist. Summit No. 26506, 2012-Ohio-5999, ¶ 19. While courts must ensure that due process is provided in parental termination proceedings, "a parent facing termination of parental rights must exhibit cooperation and must communicate with counsel and with the court in order to have standing to argue that due process was not followed in a termination proceeding." *In re Q.G.*, 170 Ohio App.3d 609, 2007-Ohio-1312, 868 N.E.2d 713, ¶ 12 (8th Dist.); *In re A.M.*, 8th Dist. Cuyahoga No. 106789, 2018-Ohio-3186, ¶ 30.

{¶ 18} In addition to finding that appellant had constructive notice of all hearings, we also conclude that a notice issue may be waived on appeal when a parent's attorney is present for various permanent custody hearings and does not raise the improper notice issue. In *In re Billingsley*, *supra,* at ¶ 10, mother argued that the trial court did not give her notice of the adjudicatory or dispositional hearings and the hearings occurred in her absence. The Third District acknowledged that "[w]hen the record contains no evidence that a parent was apprised of the dependency hearing, a determination in relation thereto is void." *Id.* at ¶ 9, citing *In re Brown*, 98 Ohio App.3d 337, 346, 648 N.E.2d 576 (3d Dist.1994), quoting *In re Corey,* 145 Ohio St. 413, 61 N.E.2d 892 (1945), paragraph one of the syllabus. The court, however, concluded that the mother "had, at the very least, constructive notice" of the hearings, and waived any error concerning notice when she failed to object. *Id.* at ¶ 10. *See also In re Lee P.* at ¶ 9, *In re D.H.*, *supra,* at ¶ 38.

{¶ 19} In another waiver case, the trial court sent the permanent custody motion, notice of hearing, and statutory warnings by certified mail to a Cleveland address, but they were returned

as undeliverable. *In re X.Q.*, 8th Dist. Cuyahoga No. 107851, 2019-Ohio-1782. When the Guardian Ad Litem (GAL) advised the court that the mother moved to Thailand, the court continued the temporary custody order and attempted to serve her at a Thailand address. However, the post was returned as undeliverable. After mother returned to Ohio, the court sent certified mail notice to another Cleveland address, but it was returned marked "unclaimed." The court re-sent notice by ordinary mail, which was also returned as undeliverable. When mother did not appear for trial, the GAL called her. The court held a short recess, then proceeded. Mother's counsel appeared, but did not object to the service or notice. The Eighth District concluded that, after receiving notice of the hearing, because mother's attorney appeared before the court and did not raise any argument as to improper notice, she waived any argument on appeal. *Id.* at ¶ 17.

{¶ 20} Finally, in *In re J.M.B.*, 4th Dist. Ross No. 07CA2978, 2008-Ohio-1285, this court considered a case in which the agency personally served father a copy of the complaint and he entered an appearance through counsel. Although father's attorney appeared at the adjudicatory and dispositional hearings, father did not. Father argued that the trial court denied him due process because he did not receive notice of the hearings, but this court concluded that the father received sufficient notice of the two hearings. *Id.* at ¶ 1. While *J.M.B.* differs from the case at bar in that mother's notices of the second pretrial and final hearing were returned to the clerk as undeliverable, we recognized in *J.M.B.,* that "the record suggests that, at some point, [father]'s address of record did not reflect where he actually lived, and we are aware of the possibility that his address of record was incorrect from the outset. Nonetheless, counsel appeared on his behalf and failed to raise any issue with [father]'s address of record." *Id.* at ¶ 19.

{¶ 21} In the case sub judice, appellee filed motions for permanent custody on October 31, 2019. The Sheriff's Department personally served appellant with the permanent custody motion. Eight days later, for reasons that are unclear but which appellant does not allege were malicious, appellee filed a Notice of Filing and asked the court to update the parents' address to 1187 Sidney Street (appellant's correct address was 1188 Sidney Street). After that, all posts were returned as undeliverable.

{¶ 22} The trial court held pretrial hearings on the permanent custody motion on January 6, 2020 and February 3, 2020. The summons that accompanied the October 31, 2019 permanent custody motion (sent to the correct address) included the January 6 hearing date. Appellant did attend the January 6 pretrial hearing, but the docket reflects that her attorney was unavailable due to an injury. Although appellant did not attend the February 3, 2020 pretrial hearing, her attorney did and the court ordered the matter set for the final hearing on March 3, 2020.[2] In addition to notice of hearing dates, the record reveals that appellant's counsel received all magistrate decisions and trial court journal entries.

{¶ 23} On March 3, 2020, the trial court held the final hearing on the permanent custody motion. Appellant's counsel attended the entire hearing. Appellant arrived approximately one hour late, but the court did permit her to participate and to testify. Although notices for the pretrial hearings and final hearing were returned as undeliverable, appellant did attend one pretrial and the final hearing. Appellant's counsel attended all but the January pretrial hearing

[2] Appellee contends that appellant had notice of the February 3 pretrial hearing because she allegedly contacted the trial court and her attorney, who was present, via phone and stated that she had no transportation to attend the second pretrial hearing. However, the February 3 pretrial hearing transcript is not in the record and we cannot verify this assertion.

that appellant attended. Thus, after our review of the record in the case sub judice, we conclude that appellant had constructive notice of all hearings and filings. Most important, although we certainly share appellant's counsel's concern about proper notice and attendance at court hearings, in the case at bar we do not believe that appellant suffered any prejudice that resulted from misdelivered notices. Additionally, it appears that appellant failed to raise any issue about her incorrect address or lack of notice at trial and, thus, is barred from doing so on appeal. *In re Billingsley, supra,* at ¶ 10; *In re Lee P., supra,* at ¶ 9; *In re D.H., supra,* at ¶ 38.

{¶ 24} Accordingly, based upon the foregoing reasons we overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court, Juvenile Division, to carry these judgments into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.