

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of S.M. and R.J., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KASIE MILLER,

Respondent-Appellant,

and

RENEA MARX,

Respondent.

UNPUBLISHED
December 26, 2000

No. 220706
Jackson Circuit Court
Family Division
LC No. 99-092026-NA

Before: O'Connell, P.J., and Zahra and B.B. MacKenzie,* JJ.

PER CURIAM.

Respondent-appellant (hereinafter respondent) appeals as of right from an order terminating his parental rights to his two daughters. On appeal, respondent argues that the trial court deprived him of procedural due process when it granted petitioner's motion to strike respondent's witness list. We disagree and affirm.

The Family Independence Agency (petitioner) filed its petition requesting jurisdiction over the minor children on January 25, 1999. The petition alleged that respondent forced his youngest daughter to perform multiple acts of oral sex on him and that he engaged in multiple acts of oral sex on her. The petition further alleged that respondent had shown her pornographic movies and would watch her take baths.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

During a pretrial hearing on March 30, 1999, respondent informed the court that he intended to present approximately six witnesses. On March 31, 1999, the trial court ordered the parties to file any witness lists, not previously submitted to the court, within two weeks. Respondent filed his witness list with the trial court on June 4, 1999. Petitioner promptly filed objections to respondent's witness list, arguing that the list was untimely and lacked sufficient information for petitioner to investigate respondent's witnesses.

The trial court considered the motion before the commencement of the jurisdictional jury trial on June 10, 1999. Petitioner urged the court to exclude respondent's witnesses from testifying. Respondent stated that his witness list was late because he thought that he would be receiving another witness list from petitioner's counsel, and that he filed the list once he learned that petitioner was not going to file another one. Respondent asked the court to adjourn the matter for approximately one week. Respondent intended to call witnesses to testify regarding both respondent's character and that of his daughter. The court denied respondent's request for an adjournment and granted petitioner's request to bar respondent's witnesses from testifying. The basis of the court's ruling was that respondent's filing was both untimely and that respondent failed to provide the addresses of his listed witnesses. The court also cited its congested docket, the risk of violating the six-month rule of MCR 5.972¹, and the inconvenience to the children's mother, also a respondent in this case, who had traveled to the court from North Carolina.

At the jurisdictional trial, petitioner called respondent's youngest daughter (R.J.), a school social worker, and the police officer who investigated the matter. Respondent was the only other witness. He denied petitioner's allegations and testified that another person actually sexually abused his daughter. Respondent posited that R.J. had fabricated the allegations against him in retaliation for something he had done in the past. The jury found that the court had jurisdiction over both children. After a July 13, 1999, termination hearing, the trial court entered an order terminating respondent's parental rights pursuant to MCL 712A.19b(3)(b)(i); MSA 27.3178(598.19b)(3)(b)(i).

Respondent first argues that the trial court abused its discretion in not adjourning the trial or accepting the witness list. He further argues that the trial court's failure to allow him to present witnesses deprived him of his due process rights under the state and federal constitutions, US Const, Am XIV; Const 1963, art 1, § 17. We review this issue for whether respondent demonstrated good cause for his failure to comply with the court's pretrial order. MCR 2.401(I)(2); *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 91; 618 NW2d 66 (2000). We review issues of due process de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

MCR 5.922(A) addresses discovery in child protection proceedings. The rule provides, in relevant part, as follows:

¹ MCR 5.972(A) states that courts must hold the trial on the petition within six months after the filing of the petition.

(1) The following materials are discoverable as of right in all proceedings provided they are requested no later than 21 days before trial:

* * *

(c) the names of prospective witnesses;

* * *

(e) the results of all scientific, medical, or other expert tests or experiments, including the reports or findings of all experts, which are prospective evidence in the matter;

While this rule governs discovery in child protection proceedings, it does not provide any consequences for a party's noncompliance. MCR 5.922(D), however, incorporates MCR 2.401 regarding the procedures for pretrial conferences. MCR 2.401(I), which governs the filing of witness lists in civil matters, provides in pertinent part:

(1) No later than the time directed by the court under subrule (B)(2)(a), the parties shall file and serve witness lists. The witness list must include:

(a) the name of each witness, and the witness's address, if known; however, records custodians whose testimony would be limited to providing the foundation for the admission of records may be identified generally;

(b) whether the witness is an expert, and the field of expertise.

(2) The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown.

Scheduling orders promote the efficient processing of cases, *People v Grove*, 455 Mich 439, 465; 566 NW2d 547 (1997), and the exchange of witness lists avoids a "trial by surprise," *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). The reason that respondent offered to explain the untimeliness of his filing is less than persuasive. The court's prior orders were clear in stating that respondent was to file his witness list within fourteen days of the pretrial hearing, irrespective of whether petitioner filed a supplemental witness list. Respondent's filing was almost two months late despite the fact that at the pretrial hearing respondent already had a preliminary idea regarding his witnesses. Respondent did not demonstrate good cause for his failure to comply with the pretrial order. Therefore, the trial court did not abuse its discretion in prohibiting respondent's witnesses from testifying.

Respondent also argues that the trial court's ruling amounted to a due process violation. Due process, as a fundamental matter, requires that a party be afforded an opportunity to be heard "at a meaningful time and in a meaningful manner." *In re Attorney Fees of Jacobs*, 185 Mich App 642, 645; 463 NW2d 171 (1990), quoting *Mathews v Eldridge*, 424 US 319, 333; 96 S Ct 893; 47 L Ed 2d 18 (1976).

While the due process requirements in child protective proceedings are not as great as in criminal matters, they are greater than the due process protections afforded in general civil matters because a parent's interest in retaining his rights to his child is at stake. *In re Render*, 145 Mich App 344, 347; 377 NW2d 421 (1985). Courts consider three general factors in determining the requirements of due process in a particular situation:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), quoting *Mathews*, *supra* at 335.]

Respondent's due process argument involves a close question. His attorney conceded that he was negligent for failing to file the witness list on time. The error prevented respondent from presenting any witnesses, other than himself, on the issue whether petitioner established sufficient grounds for the court to assume jurisdiction. The private interest that the court's ruling affected was respondent's custody of his children, which later resulted in the termination of his parental rights. Therefore, defendant had a protected liberty interest at stake. *Brock*, *supra* at 109.

The second factor is the risk of an erroneous deprivation of respondent's parental rights. In this case the trial court chose to impose a severe sanction for respondent's failure to timely file his witness list. The witnesses that respondent sought to add were character witnesses. Respondent himself was able to testify and explain why he believed that his daughter, R.J., had lied about the allegations against him. The character witnesses would have offered little support to respondent's defense, given that these individuals were not witnesses to the incidents that petitioner alleged.

Third, this Court must consider the burdens imposed if the trial court were to follow substitute procedural requirements. The trial court cited a number of reasons for its refusal to grant an adjournment or allow respondent to call his witnesses. The late filing of the witness list hindered petitioner's efforts to prepare for trial because petitioner's counsel did not have sufficient time to interview or investigate the witnesses listed. Further, respondent did not provide enough information to allow petitioner to locate these witnesses. An adjournment would have also required the children's mother, also a respondent in this case, to make another trip from North Carolina. She also had an interest in seeing that the trial court promptly heard the case. Finally, an adjournment would have hindered the court's compliance with the six-month time limit for adjudicative trials in child protective proceedings contained in MCR 5.972(A).

The underlying purpose behind the Juvenile Code is to serve the child's welfare and the best interests of the state. MCL 712A.1(3); MSA 27.3179(598.1)(3); MCR 5.902(B); *In re Jagers*, 224 Mich App 359, 362; 568 NW2d 837 (1997). We construe the applicable law with these purposes in mind. Allowing parents to delay child protective proceedings longer than six

months places a burden on all the other parties involved. Our analysis has resulted in only one of the three factors discussed in *Brock, supra* at 111, weighing in respondent's favor. Although we do not suggest that a party in respondent's position must necessarily satisfy a majority of the factors, we do conclude that, on balance, the trial court's ruling did not deprive respondent of his right to procedural due process.

Affirmed.

/s/ Peter D. O'Connell
/s/ Brian K. Zahra
/s/ Barbara B. MacKenzie