# STATE OF MICHIGAN

# COURT OF APPEALS

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In the Matter of FELICIA MOSHER and JESSIE DIAZ, Minors.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ANGELA CARROLL,

Respondent-Appellant,

and

DAVID MOSHER and BENITO DIAZ,

Respondents.

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UNPUBLISHED
December 26, 2000

No. 225038
Midland Circuit Court
Family Division
LC No. 99-000386-NA

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

PER CURIAM.

Respondent-appellant appeals as of right from the family court order terminating her parental rights to the minor children under MCL 712A.19b(3)(g), (i) and (j); MSA 27.3178(598.19b)(3)(g), (i) and (j). We affirm.

Respondent-appellant argues that the family court lacked jurisdiction to terminate her parental rights because she was not properly served with notice of the termination proceedings. "A failure to provide notice of a termination proceeding hearing by personal service as required by statute, MCL 712A.12; MSA 27.3178(598.12), is a jurisdictional defect that renders all proceedings in the family court void." *In re Terry*, 240 Mich App 14, 21; 610 NW2d 563 (2000), citing *In re Atkins*, 237 Mich App 249, 250-251; 602 NW2d 594 (1999).

Respondent-appellant claims that, although she was personally served with notice of the adjudicatory hearing, the notice was not timely. We conclude that this issue was waived because

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

respondent-appellant appeared at the subsequent dispositional hearing and did not challenge or raise the issue of notice with respect to the prior adjudication hearing. See *In re Gillespie*, 197 Mich App 440, 446-447; 496 NW2d 309 (1992). Regardless, the record indicates that respondent-appellant was personally served with a summons and a copy of the amended petition requesting termination eleven days before the adjudicative hearing. Such notice was timely under MCL 712A.13; MSA 27.3178(598.13) and MCR 5.920(B)(5)(a)(ii).

Respondent-appellant also claims that the notice of the dispositional hearing at which her parental rights were terminated was deficient because it was not personally served. We disagree and conclude that MCR 5.920(F) excused personal service of a fresh summons for the dispositional hearing.[1] Respondent-appellant's reliance on *In re Atkins* is misplaced. In that case, after the adjudication hearing the court entered a dispositional order placing the children in the temporary custody of the court and the termination proceedings were conducted pursuant to a supplemental petition. *Id*. at 251. Here, however, the original amended petition requested termination at the initial dispositional hearing, respondent-appellant was personally served with a summons notifying her of that intent, and she appeared in court in response to that summons. Under these circumstances, personal service of a second summons was not required. MCR 5.920(F).

Respondent-appellant also argues that the family court's failure to appoint counsel until after the preliminary hearing deprived her of her right to counsel. We disagree. In child protective proceedings, indigent respondents are afforded the right to court-appointed counsel by statute, MCL 712A.17c(5); MSA 27.3178(598.17c)(5), and court rule, MCR 5.915(B)(1).[2] MCR

[1] MCR 5.920(F) provides:

> Subsequent Notices. After a party's first appearance before the court, subsequent notice of proceedings and pleadings shall be served on that party or, if the party has an attorney, on the attorney for the party, except that a summons must be served before trial or termination hearing as provided in subrule (B) unless a prior court appearance of the party in the case was in response to service by summons.

[2] MCR 5.915(B)(1) provides:

> (1) *Respondent.*
>
> (a) At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that
>
> (i) the respondent has the right to a court-appointed attorney if the respondent is financially unable to retain counsel, and,
>
> (ii) if the respondent is not represented by an attorney, that the respondent may request and receive a court-appointed attorney at any later hearing.

(continued…)

5.915(B)(1) mandates the appointment of counsel for indigent parents at all hearings in a child protective proceeding. *In re Osborne*, 230 Mich App 712, 716; 584 NW2d 649 (1998), vacated on other grounds 459 Mich 360 (1999). However, affirmative action on the part of the respondent is required to trigger the appointment and continuation of appointed counsel in all hearings which may affect the respondent's parental rights. *In re Hall*, 188 Mich App 217, 222; 469 NW2d 56 (1991).

The family court advised respondent-appellant at the preliminary hearing of her right to an attorney at all subsequent hearings and her right to a court-appointed attorney if she were financially unable to retain counsel. Respondent-appellant indicated that she understood her rights. After taking testimony, the court advised respondent-appellant that she had the right to make a statement. The court reminded respondent-appellant that she had the right to have an attorney represent her and might want to wait until she had a chance to speak with an attorney to

(…continued)

> (b) When it appears to the court, following an examination of the record, through written financial statements, or through other means that the respondent is financially unable to retain an attorney and the respondent desires an attorney, the court shall appoint one to represent the respondent at any hearing conducted pursuant to these rules.
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> (c) The respondent may waive the right to an attorney, except that the court shall not accept the waiver by a respondent who is a minor when a parent or guardian ad litem objects to the waiver.

MCL 712A.17c; MSA 27.3178(598.17c) similarly provides, in relevant part:

> (4) In a proceeding under section 2(b) of this chapter, the court shall advise the respondent at the respondent's first court appearance of all of the following:
>
> (a) The right to an attorney at each stage of the proceeding.
>
> (b) The right to a court-appointed attorney if the respondent is financially unable to employ an attorney.
>
> (c) If the respondent is not represented by an attorney, the right to request and receive a court-appointed attorney at a later proceeding.
>
> (5) If it appears to the court in a proceeding under section 2(b) of this chapter that the respondent wants an attorney and is financially unable to retain an attorney, the court shall appoint an attorney to represent the respondent.
>
> (6) Except as otherwise provided in this subsection, in a proceeding under section 2(b) of this chapter, the respondent may waive his or her right to an attorney. A respondent who is a minor may not waive his or her right to an attorney if the respondent's parent or guardian ad litem objects.

make a statement. The court noted that what was stated at the hearing could be used in further hearings. Respondent-appellant stated that she would like to wait to make a statement until she had an attorney. After authorizing the temporary custody petition for filing, the court noted that respondent-appellant had indicated that she would like to have an attorney represent her and directed respondent-appellant to file at the conclusion of the hearing a request for a court-appointed attorney. Respondent-appellant did not file a request for an attorney until two weeks after the preliminary hearing.

Respondent-appellant argues that her assertion at the preliminary hearing that she wanted to wait until she had an attorney to make a statement met the affirmative action requirement in *In re Hall* to trigger the appointment of counsel, and that the family court was compelled to stop the hearing at that point. We disagree and conclude that respondent-appellant's statement was not a request for appointed counsel, but was merely a statement that she wanted to wait to make a statement until she had an attorney. Respondent-appellant did not actually request an attorney until two weeks after the preliminary hearing. Under MCR 5.915(B)(1), respondent-appellant did not have the right to appointment of counsel until she first requested that counsel be appointed and the court made a determination regarding respondent-appellant's financial inability to retain counsel. Counsel could then be appointed to represent respondent-appellant "at any later hearing" pursuant to MCR 5.915(B)(1)(a)(ii). Respondent-appellant's rights were not violated at the preliminary hearing because the family court referee carefully sought to ensure that respondent-appellant understood the nature of the proceedings and properly advised respondent-appellant of her right to an attorney and what she needed to do to request an attorney. Accordingly, there was no error.

Finally, the family court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence. MCR 5.974(I); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Further, the evidence did not establish that termination of respondent-appellant's parental rights was clearly not in the children's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). Thus, the family court did not err in terminating respondent-appellant's parental rights to the children. *Id.*

Affirmed.

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