STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DH, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CASSANDRA MALANE,

Respondent-Appellant.

UNPUBLISHED
February 19, 2002

No. 233999
Wayne Circuit Court
Family Division
LC No. 00-392000

Before: Neff, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating her parental rights to a minor child, entered on March 14, 2001.[1] We affirm.

I. Jurisdiction

Respondent argues that the court lacked jurisdiction to terminate her parental rights because she was not properly served with notice of the termination proceedings.

"Whether a court has personal jurisdiction over a party is a question of law, which this Court reviews de novo." *In re Terry*, 240 Mich App 14, 20; 610 NW2d 563 (2000). Notice of a termination proceeding by personal service is required by statute under MCL 712A.12, and the failure to provide proper notice "is a jurisdictional defect that renders all proceedings in the family court void." *In re Atkins*, 237 Mich App 249, 250-251; 602 NW2d 594 (1999). This requirement in a child protective proceeding is reflected in MCR 5.920(B)(4)(a), which provides that, "[e]xcept as provided in subrules (B)(4)(b) and (c), a summons required under subrule (B)(2) must be served by delivering the summons to the party personally."

[1] On the same date, the trial court terminated the parental rights of the child's putative father, Manuel Hines, under MCL 712A.19b(3)(a)(ii) and MCL 712A.19b(3)(g). Mr. Hines has not appealed the court's termination order.

However, if personal service is impracticable or unsuccessful, MCL 712A.13 provides alternative methods of service sufficient to confer jurisdiction on the probate court. *Matter of Mayfield*, 198 Mich App 226, 231; 497 NW2d 578 (1993). Alternative service methods are also set forth under MCR 5.920(B)(4) which provides, in pertinent part:

> (b) If personal service of the summons is impracticable or cannot be achieved, the court may direct that it be served by registered or certified mail addressed to the last known address of the party, return receipt requested.
>
> (c) If the court finds service cannot be made because the whereabouts of the person to be summoned has not been determined after reasonable effort, the court may direct any manner of substituted service, including publication.

Here, a Wayne County Deputy Sheriff personally served respondent with notice of the September 18, 2000 hearing on September 6, 2000. However, thereafter, two attempts at personal service of notice of the permanent custody hearing were unsuccessful. Documents in the lower court file indicate that the Wayne County Sheriff attempted personal service on October 25, 2000 and December 4, 2000, but that respondent could not be located. Further, the lower court file contains a copy of a certified letter sent to respondent at the Doorstep Shelter on October 19, 2000, but the letter was returned as unclaimed. Ultimately, notice of the proceeding was published in the Detroit Legal News.

The record clearly reflects that reasonable efforts were made to personally serve respondent as required under MCL 712A.12 and MCR 5.920(B)(4)(a), but that personal service was impracticable and could not be achieved. Further, in compliance with MCL 712A.13 and MCR 5.920(B)(4)(b), FIA attempted service by certified mail. The record shows that respondent's whereabouts were unknown at virtually every point in the protective custody proceedings. Indeed, respondent's own attorney and guardian ad litem failed to locate respondent and were left only to speculate regarding her whereabouts. Moreover, FIA case workers testified that respondent gave various addresses and phone numbers for where she lived, but that follow-up inquiries established that the information respondent provided was inaccurate or fictitious. Because reasonable efforts were made to personally serve respondent and to serve her by certified mail, the court did not err in ruling that service by publication, made in compliance with MCL 712A.13 and MCR 2.920(B)(4)(c), was effective to confer jurisdiction on the court.

II. Grounds for Termination

Respondent maintains that clear and convincing evidence did not support the termination of her parental rights. We disagree.

The trial court terminated respondent's parental rights to the infant based on the following statutory grounds under MCL 712A.19b(3):

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

(a) The child has been deserted under any of the following circumstances:

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(ii) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.

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(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

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(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

This Court "review[s] for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Trejo*, 462 Mich 341, 356-357, 612 N.W.2d 407 (2000). "In order to terminate parental rights, the court must find that at least one of the statutory grounds for termination has been met by clear and convincing evidence." *In re TM*, 245 Mich App 181, 192; 628 NW2d 570 (2001). "Once a statutory ground for termination has been met by clear and convincing evidence, termination of parental rights is mandatory unless the court finds that termination clearly is not in the child's best interests." *Id*., citing MCL 712A.19b(5).

Clear and convincing evidence established that respondent deserted the infant for more than ninety-one days and did not seek custody of the infant during that time. Accordingly, the trial court was required to terminate respondent's parental rights based on MCL 712A.19b(3)(a)(ii).

FIA protective services took temporary custody of the infant on August 16, 2000, and the referee conducted the final termination hearing on January 9, 2001. During the pendency of this action, respondent failed to seek custody of the infant and made no attempt to visit or provide support. As discussed above, respondent's whereabouts were unknown for much of the duration of this case and she made no effort to appear at proceedings or to cooperate with FIA case workers to pursue custody. Despite having pertinent telephone numbers for her guardian ad litem and several case workers, respondent did not keep in contact with anyone associated with her case. According to foster care supervisor Dhalia Balmir, respondent demonstrated that she possessed contact information regarding her case and showed an ability to use it because she called Orchards approximately six times during the proceedings; however, she repeatedly left messages with false information regarding her whereabouts.

Contrary to respondent's assertions on appeal, evidence presented at the termination hearing shows that respondent received appropriate contact information to pursue custody as well as a parent-agency agreement at her intake interview at Orchards. Balmir testified that they informed respondent that the first step necessary to regain custody of the infant was for respondent to complete a psychiatric treatment program. Not only did respondent fail to demonstrate an effort to comply with this first step, she unfortunately failed to apprise foster care workers of where she could be located for further assistance. Moreover, despite actual knowledge of more than one of the pretrial hearings, respondent failed to appear in court.

Respondent blames her failure to pursue custody on Schirmer's medical leave. The record indicates that Schirmer left her job at FIA protective services for a five-month medical leave at the end of August 2000. Respondent argues that this somehow contributed to the mishandling of this case and that "the case fell through the cracks." However, Schirmer emphasized at the custody hearing that, after the initial protective services action, the case was appropriately turned over to FIA foster care at Orchards and that she gave respondent follow-up information and phone numbers for the workers handling her case. Indeed, foster care workers at Orchards made significant efforts to contact respondent and respondent received information regarding the necessary steps to regain custody of the infant. Again, despite a demonstrated ability to contact the case workers, respondent made no effort to pursue custody during the five months the infant was in foster care.

Thus, clear and convincing evidence established that respondent deserted the child for more than ninety-one days and failed to seek custody during that time. Accordingly, the trial court was required to terminate respondent's parental rights under MCL 712A.19b(5).

Clear and convincing evidence also established that respondent failed to provide proper care or custody for the infant and that she will be unable to do so within a reasonable time. MCL 712A.19b(3)(g). Moreover, significant evidence suggests that there is a reasonable likelihood that the infant will be harmed if returned to respondent's care. MCL 712A.19b(3)(j).

When police took the infant into custody, he appeared to be in good health and he showed no signs of physical abuse. Nonetheless, FIA removed the infant from respondent's care because she threatened to jump out of the window of the drug treatment center with the infant in her arms. Further, FIA presented evidence that respondent left the infant unattended in a bathtub full of water on two occasions when he was less than one year old. By her own admission, respondent is a regular crack cocaine user with no permanent residence. Moreover, respondent has repeatedly attempted to commit suicide and suffers from schizophrenia and major depression. Notwithstanding the seriousness of her condition, respondent admitted to a case worker that she does not take the medication prescribed to control her paranoia and suicidal compulsions.

This evidence strongly suggest that respondent failed to take proper care of the infant while she had custody of him. While the infant did not appear to have been physically abused when FIA interceded, that the infant did not drown in the bathtub or end up falling out of the window at the SHAR drug treatment facility appears to have been solely due to the fortuitous intervention of workers at SHAR. Respondent's mental condition and drug habit no doubt contributed to her reckless and neglectful behavior; however, respondent's failure to complete a

psychiatric treatment program, her refusal to take her prescribed medication and her continuing, unresolved drug habit suggest she will not be able to care for the infant within a reasonable time.

Respondent maintains in her appeal brief that she was consistently seeking treatment for her drug or psychiatric problems during these proceedings. She cites the names of several facilities mentioned at the hearings: SHAR, Oakdale Treatment Center, Turning Point Shelter, Riverview Hospital and Doorstep Shelter. However, while those centers were mentioned on the record as potential locations where respondent might be staying, no evidence confirmed that respondent lived or was treated at any facilities other than SHAR and Riverview. In fact, respondent's own attorney and guardian at litem could not locate her at any of the above facilities. We also note that, given the infant's vulnerable age and evidence that he suffers from asthma that requires multiple daily breathing treatments, he is in need of consistent and attentive care in a permanent residence. Respondent has shown no sign that she will be capable of providing such care or shelter at any time in the reasonable future.

Overwhelming evidence also suggests that the infant's life will be in danger if he is returned to respondent's care in her current condition. It is clear that the infant has narrowly escaped grave injuries on at least three occasions while in respondent's custody. Based on respondent's mental problems and continued drug use, as well as evidence that respondent has not corrected these problems, there is a significant risk that the infant will be harmed if returned to respondent, whether by neglect or by physical injury inflicted by respondent while in a delusional or paranoid state. Accordingly, the trial court did not err in finding that clear and convincing evidence established grounds for termination under both MCL 712A.19b(3)(g) and MCL 712A.19b(3)(j).

We also reject respondent's claim that the lack of physical signs of abuse and neglect on the infant is sufficient to show termination was clearly not in the infant's best interests. Respondent did not appear for or present evidence at the termination hearing. However, "even where no best interest evidence is offered after a ground for termination has been established, . . . [MCL 712A.19b(5)] permits the court to find from evidence on the whole record that termination is clearly not in a child's best interests." *Trejo, supra* at 353. Accordingly, if there were sufficient evidence, the trial court could have found, based on the whole record, that termination was clearly not in the infant's best interests. However, the trial court correctly declined to make such a finding, particularly in light of the considerable evidence of respondent's improper care of the infant and the significant physical danger to which he was exposed.

Affirmed.

/s/ Janet T. Neff
/s/ Mark J. Cavanagh
/s/ Henry William Saad