

STATE OF MICHIGAN
COURT OF APPEALS

In re P. A. L. LEDBETTER, Minor.

UNPUBLISHED
November 19, 2019

No. 348633
St. Clair Circuit Court
Family Division
LC No. 18-000169-NA

Before: M. J. KELLY, P.J., and FORT HOOD and SWARTZLE, JJ.

PER CURIAM.

Respondent appeals as of right the trial court order terminating her parental rights to the minor child under MCL 712A.19b(3)(a)(ii), (c)(i), (g), and (j). For the reasons stated in this opinion, we vacate the trial court’s order of adjudication and its order terminating respondent’s parental rights, and we remand for further proceedings.

I. BASIC FACTS

In 2018, the minor child’s father kidnapped her from respondent and transported her from the state of Arkansas to Michigan. After the child was rescued by Michigan law enforcement, she was placed with the Department of Health and Human Services (DHHS) for care and supervision. In order to recover her child, respondent traveled from Arkansas to Michigan. At a family team meeting (FTM), respondent admitted to the DHHS that she was on parole in Arkansas for a manslaughter conviction arising from the death of the child’s sibling. Respondent explained that she was concerned that she would receive a parole violation for leaving Arkansas without permission from her parole officer. In addition, respondent told the DHHS that she had depression, anxiety, and bi-polar disorder, but was not receiving any treatment. Respondent reported that she also had difficulties with methamphetamines and amphetamines, stating that she had last used within the prior three months. At the request of the DHHS, respondent submitted to a drug screen; she tested positive for methamphetamines and amphetamines.¹

¹ A child protective worker at the FTM testified that respondent appeared to be self-medicating to handle her mental-health issues. The worker explained that at the FTM respondent was unable

Following the FTM, the DHHS filed a petition seeking temporary jurisdiction over the child based on respondent's manslaughter conviction for the death of a child, her status as a parole absconder, her untreated mental-health issues, and her substance abuse.² Following the preliminary hearing—which respondent attended—the trial court found probable cause to authorize the petition. Yet, the court stated that although it was authorizing the petition, it was also “going to adjourn the remainder of the hearing to get some further guidance from Arkansas.” The court did not, however, hold any continuation of the preliminary hearing. Instead, on July 5, 2018, it held a pretrial. Respondent was not present, and the court set the matter on its trial docket.

The adjudication trial was held on July 18, 2018. Respondent was not present, nor was she represented by a lawyer. A child protection worker testified to the circumstances leading to the adjudication trial, including that the child had been kidnapped and brought to Michigan by her father, that respondent had absconded from parole in Arkansas to pick up the child after she was rescued by Michigan law enforcement, that respondent admitted to mental health and substance abuse issues, and that respondent tested positive for methamphetamines and amphetamines. In addition, the caseworker testified that respondent's manslaughter conviction arose because one of respondent's children had died as a result of an unsafe sleeping environment, that respondent had received mental-health and substance abuse treatment in prison for that conviction, and that respondent claimed to have relapsed from the stress of the parental kidnapping. Another child protection worker testified that respondent had returned to Arkansas, but contact with her was difficult because respondent's telephone did not accept incoming phone calls. Based on the testimony, the trial court found grounds under MCL 712A.2(b) to take jurisdiction over the minor child.

On February 7, 2019, the DHHS filed a supplemental petition seeking termination of respondent's parental rights under MCL 712A.19b(3)(a)(ii), (c)(i), (g), and (j).³ Following a termination hearing, the court found grounds to terminate respondent's parental rights under MCL 712A.19b(3)(a)(ii), (c)(i), (g), and (j). It also found that termination of respondent's parental rights was in the minor child's best interests.

to formulate proper sentences, her speech was slurred, her pupils were dilated, she was jittery and appeared to be in a nervous state, and she was jumping from subject to subject.

² The petition also contained allegations against the child's father. Following the termination of respondent's parental rights, he voluntarily relinquished his parental rights and is not a party to this appeal. Accordingly, this opinion will only address allegations and evidence related to respondent.

³ It does not appear that respondent was notified before trial that the DHHS was seeking termination under MCL 712A.19b(3)(c)(i). The judge's copy of the supplemental petition includes a handwritten addition noting that (c)(i) was added by “notes of trial”, but the copy faxed to respondent does not mention that termination was sought under MCL 712A.19b(3)(c)(i).

II. DUE PROCESS

A. STANDARD OF REVIEW

Respondent argues that her due process rights were violated by the trial court because she was not represented by a lawyer at the adjudication hearing. This issue was raised by respondent at the termination hearing, which was the first proceeding where respondent was represented by a lawyer. Specifically, respondent challenged the court's jurisdiction on the basis that she was not represented by a lawyer at the adjudication hearing. The trial court, however, found that respondent was not entitled to relief because she had waived her right to be represented by a lawyer at the preliminary hearing. The court determined that respondent's waiver at the preliminary hearing would "carry forward until" respondent requested a lawyer, which she had not done at the time of the adjudication trial.⁴ Given that this issue was raised before and decided by the trial court, it is preserved for appellate review. See *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005); see also *In re Ferranti, minor*, ___ Mich ___, ___; ___ NW2d ___ (2019) (Docket No. 157907); slip op at 22 (stating that we review for plain error a challenge to the trial court's adjudication order entered "after the trial court has terminated parental rights . . .") (emphasis added). We review de novo whether child protective proceedings complied with a parent's due-process rights. *Id.* at ___ slip op at 8. Likewise we review de novo the interpretation and application of statutes and court rules. *Id.*

B. ANALYSIS

Parents have a fundamental right "to make decisions concerning the care, custody, and control of their children." *In re Sanders*, 495 Mich 394, 409; 852 NW2d 524 (2014). Due process requires the state to afford a parent with minimal procedural protections before burdening that right. *Id.* at 410. A parent is, therefore, "entitled to a hearing to determine the parent's fitness before the state can infringe the right to direct the care, custody, and control of his or her children." *Id.* at 411. At the adjudication trial, the parent is afforded with a number of protections that are generally absent during later proceedings, including the right to have a jury determine his or her fitness as a parent and the right to have the petitioner prove one or more of the statutory grounds for jurisdiction alleged in the petition using evidence admissible under the rules of evidence. *Id.* at 405.

Respondent was entitled to be represented by a lawyer at the adjudication trial. "This Court has explicitly recognized that the United States Constitution guarantees a right to counsel in parental rights termination cases . . . [and] that the constitutional right of due process confers on indigent parents the right to appointed counsel at hearings that may involve the termination of their parental rights." *In re Williams*, 286 Mich App 253, 275–276; 779 NW2d 286 (2009)

⁴ Interestingly, although respondent did not request a lawyer, the court appointed one for her on March 6, 2019, so that she would be represented at the termination hearing. Respondent was also provided with multiple notices of the proceedings to terminate her parental rights, including by publication in a newspaper in the area where she was believed to live and a copy of the supplemental petition was faxed to her at a corrections' facility where she was incarcerated.

(citations omitted). In addition, MCL 712A.17c(4) and (5), as well as MCR 3.915(B)(1), require the court at the first hearing to notify indigent respondents of their right to a lawyer in termination proceedings, and to appoint a lawyer when the respondent is “financially unable to retain an attorney.” Although MCL 712A.17c(6) and MCR 3.915(B)(1)(c) permit a respondent to waive her right to assistance of a lawyer, “courts are to make every reasonable presumption against the waiver of a fundamental constitutional right,” and a person cannot waive his or her right to a lawyer unless: (1) the waiver is unequivocal; (2) the waiver is made “knowingly, intelligently, and voluntarily;” and (3) self-representation will not disrupt the court proceedings. *People v Russell*, 471 Mich 182, 188, 190; 684 NW2d 745 (2004).⁵

Here, the purported waiver occurred at the preliminary hearing during the following exchange between respondent and the court:

Q. . . . And, at this time, I’ll advise [respondent] that the purpose of the preliminary hearing is for the Court to determine if there’s probable cause to authorize the filing of a petition concerning your child.

A. Yes, sir.

Q. If probable cause is established then the petition would be authorized and we would proceed to a further hearing or hearings at a later time.

A. Yes, sir.

Q. You would have the right to be represented by an attorney in this matter. The Court would provide an attorney for you if you wanted one and could not afford one. You’d also have the right to have witnesses subpoenaed, to compel those witnesses to appear and testify at a trial, if there is a trial.

A. Yes, sir.

Q. Do you have any questions concerning any of that information?

A. I have no family here today for my support. I just want to know if that’s probable cause and also I just now got to read over these allegations and I’d like to speak to you about some of that. [Hg I, 3-4.]

⁵ Although *Russell* was a criminal case involving waiver of the right to a lawyer, “the right to due process also indirectly guarantees assistance of counsel in child protective proceedings.” *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2002) (citation omitted), overruled in part on other grounds *In re Sanders*, 495 Mich 394 (2014). Because due process guarantees other rights regarding a lawyer, such as the right to effective assistance of a lawyer, principles pertaining to waiver of the right to a lawyer “developed in the context of criminal law [also] apply by analogy in child protective proceedings.” *Id.* at 198 (citation omitted).

Based on this exchange, it is plain that respondent made no unequivocal waiver of her right to be represented by a lawyer. Furthermore, nothing in the record supports a finding that she knowingly, intelligently, and voluntarily waived any such right. Instead, the exchange highlights that respondent was *informed* of her right to a lawyer and that she acknowledged the existence of such a right, but she neither invoked nor waived it. The failure to invoke the right to a lawyer is not the equivalent of a waiver of that right. Accordingly, we conclude that respondent did not waive her right to a lawyer. The trial court's findings to the contrary are clearly erroneous.

In addition, the trial court erred by holding the adjudication trial in respondent's absence. Under MCR 3.972(B), the trial court may proceed with an adjudication trial "in the absence of the respondent *provided notice has been served on the respondent.*" Here, MCR 3.920(G) expressly provides that "a summons must be served for trial . . . in accordance with [MCR 3.920(B)]." As it relates to child protective proceedings, MCR 3.920(B)(3) provides that the summons must direct the respondent "to appear at a time and place specified by the court" and it must:

- (a) identify the nature of hearing;
- (b) explain the right to an attorney and the right to trial by judge or jury, including, where appropriate, that there is no right to a jury at a termination hearing;
- (c) if the summons is for a child protective proceeding, include notice that the hearing could result in termination of parental rights of a respondent parent; and
- (d) have a copy of the petition attached. [MCR 3.920(B)(3).]

In this case, no summons was issued or served on respondent in connection with the adjudication trial. Paltry "notice" was instead sent to her last known address 12 days before the adjudication trial.⁶ Yet, in addressing the time of service, MCR 3.920(B)(5)(a)(ii) provides that if the summons is personally served it must be served 7 days before trial, and MCR 3.920(5)(b) provides that if the summons is served by registered mail it must be served "14 days earlier than required by subrule (a) if the respondent "to be served resides outside Michigan." It is undisputed that respondent resided in Arkansas. It is, therefore, clear that by only sending "notice" 12 days in advance of the adjudication trial and by sending the notice by ordinary mail,

⁶ The record contains a proof of service indicating that respondent was served with a copy of the court's order after pretrial by ordinary mail at her last known address. The order after pretrial stated that placement of the child would continue pending trial on July 18, 2018. It did not state the purpose of the trial, nor did the order include an explanation that respondent had the right to be represented by a lawyer. In fact, there is nothing in the record indicating that prior to the adjudication trial, respondent was ever informed of its importance in the child protective proceedings.

respondent was not properly served in this case. Because she did not receive proper notice of the adjudication trial, the court could not proceed in her absence. MCR 3.972(B).

The trial court's decision to forge ahead with the adjudication trial in respondent's absence after she had not been properly notified of the proceeding, and its decision to proceed without a waiver of respondent's right to be represented by a lawyer, resulted in an adjudication hearing that violated respondent's due-process rights. The fact that a lawyer was eventually appointed to represent respondent at the termination hearing does not cure the constitutional defect at the adjudication trial. See *Sanders*, 495 Mich at 420 ("The possibility of a fix at the back end is not sufficient to justify a lack of process at the front end.").

"An erroneous deprivation of appointed counsel for child protective proceedings can be subject to a harmless error analysis." *Williams*, 286 Mich App at 278. MCR 3.902(A) provides that in child protective proceedings, "[l]imitations on corrections of error are governed by 2.613." The harmless-error standard provides:

An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice. [MCR 2.613(A).]

Here, respondent was never given a meaningful opportunity to challenge the allegations in the petition. The adjudication trial proceeded in her absence despite the fact that she did not receive proper notice of the proceedings, and it proceeded in the absence of a knowing, voluntary, and understanding waiver of her right to be represented by a lawyer. As a result, affirming the order taking jurisdiction over the child is inconsistent with substantial justice. As reiterated by our Supreme Court recently in *Ferranti*, the failure to comport with due-process at the adjudication stage undermines the foundation of the rest of the child protective proceedings by permitting the state to interfere with and then terminate a respondent's fundamental right to parent her child without affording her due process. *Ferranti*, ___ Mich at ___; slip op at 24. Consequently, we vacate the order of adjudication and the order terminating respondent's parental rights and remand this case to the trial court for further proceedings. See *Williams*, 286 Mich App at 278.⁷

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Karen M. Fort Hood
/s/ Brock A. Swartzle

⁷ Given our resolution, we need not address the additional issues raised by respondent in her brief on appeal.