STATE OF MICHIGAN

COURT OF APPEALS

In re L. R. RADULOVICH, Minor.

UNPUBLISHED
January 21, 2020

No. 349536
Wayne Circuit Court
Family Division
LC No. 18-001168-NA

Before: RIORDAN, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating respondent's parental rights to the minor child LRR, under MCL 712A.19b(3)(b)(*i*) (physical abuse), MCL 712A.19b(3)(j) (reasonable likelihood of harm if returned to parent), MCL 712A.19b(3)(k)(*iii*) (severe physical abuse), and MCL 712A.19b(3)(k)(*v*) (abuse involving life-threatening injury). On appeal, respondent argues that the trial court clearly erred in terminating respondent's parental rights because respondent was not given proper notice of the petition to terminate her parental rights, a violation of her constitutional due process right to proper notice. We affirm.

I. STATEMENT OF FACTS

This case arises out of an allegation that respondent engaged in severe substance use during her pregnancy with LRR, and that her ongoing substance abuse was preventing her from properly caring for LRR. The Department of Health and Human Services (DHHS) filed a petition with the trial court, requesting that the trial court take jurisdiction over LRR, make LRR a temporary court ward, and place LRR with petitioner. At a pretrial hearing, respondent was personally served with this petition, told that petitioner was considering the possibility of filing an amended petition, and was asked to provide her contact information to the trial court and the foster care worker assigned to the case to maintain further communications.

Petitioner filed an amended petition requesting permanent custody of LRR and termination of respondent's parental rights. Respondent did not appear at any subsequent proceedings. Both respondent's counsel and petitioner reported being unable to reach respondent using the contact information respondent had previously provided. Petitioner attempted to effectuate service of process of the amended petition by certified mail and personal service, but both methods were unsuccessful. Service was ultimately effectuated by publication.

The trial court determined that the service provided for the original petition did not meet the service requirement for the amended, permanent custody petition, but that the record demonstrated that service of process was nevertheless attempted by sufficient alternative means. The trial court entered an order terminating respondent's parental rights to LRR.

II. DISCUSSION

Respondent argues that the trial court erred in terminating the parental rights of respondent because respondent was not personally served with notice of the amended petition for permanent custody. Respondent alleges there was insufficient evidence to demonstrate that reasonable efforts were made to serve respondent before the trial court ordered notice by publication, and thus jurisdiction was not obtained over respondent for the termination proceedings. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

Generally, "issues that are raised, addressed, and decided by the trial court are preserved for appeal." *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014). Respondent did not contest the lack of service of the amended petition for permanent custody in the trial court. Therefore, the issue is unpreserved for appeal. However, "[b]ecause we cannot ignore a process that casts serious doubt on the integrity of the proceedings and would risk substantial injustice if allowed to stand unexamined," this Court will evaluate claims of constitutional error initially raised on appeal when the alleged error may have been decisive of the outcome. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009).

Typically, "[w]hether proceedings complied with a party's right to due process presents a question of constitutional law that we review de novo." *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.). Issues of personal service and jurisdiction are also generally reviewed de novo. *In re Terry*, 240 Mich App 14, 20; 610 NW2d 563 (2000). However, "because a parent's right to custody of his or her child is an important liberty interest protected by the United States Constitution, this Court will . . . review unpreserved errors in termination proceedings for plain error." *Bailey v Schaaf*, 304 Mich App 324, 346; 852 NW2d 180 (2014), vacated in part on other grounds 497 Mich 927 (2014). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008). Reversal is only warranted when a plain error led to the conviction of an innocent defendant or when a plain error affects the "fairness, integrity or public reputation of judicial proceedings" generally. *Carines*, 460 Mich at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Factual findings are reviewed under the clearly erroneous standard, in which "[a] finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

B. DUE PROCESS RIGHT TO NOTICE

Parents have fundamental due-process rights in termination of parental rights proceedings. *In re Sanders*, 495 Mich 394, 403; 852 NW2d 524 (2014). As due process in civil cases generally requires notice of the nature of proceedings and an opportunity to be heard, statutes requiring notice to parents must be strictly construed. *In re Mayfield*, 198 Mich App 226, 231; 497 NW2d 578 (1993). Typically, the "failure to provide notice of a termination proceeding hearing by personal service as required by statute, MCL 712A.12 . . ., is a jurisdictional defect that renders all proceedings in the trial court void." *In re Atkins*, 237 Mich App 249, 250-251; 602 NW2d 594 (1999). "Lack of service before the adjudicative hearing is not cured even though the noncustodial parent is represented by counsel at the hearing, and has received actual notice of the time and place of the hearing." *Mayfield*, 198 Mich App at 231. MCL 712A.13 provides an exception to the personal service requirement, allowing a trial court to order service by registered mail to the respondent's last known address, or by publication, if the trial court finds that personal service is impracticable. Service effectuated by publication made after such a finding is sufficient to confer jurisdiction over a respondent under MCL 712A.13(3). The court rules buttress the requirement that a respondent receives personal service but provide a similar exception for impracticality. MCR 3.920(B)(2)(b) provides, "In a child protective proceeding, a summons must be served on any respondent[.]" Such notice must be written, MCR 3.921(B)(3), and must be accomplished via personal service, unless the petitioner demonstrates that it "is impracticable or cannot be achieved[.]" MCR 3.920(B)(4)(a) and (b).

Respondent does not dispute that she was personally served a copy of the original petition, in which petitioner sought temporary wardship over LRR, at the first pretrial hearing. Rather, respondent specifically contests jurisdiction over the termination proceedings that occurred after petitioner's filing of the amended petition for permanent custody, because she was not personally served with a copy of the amended petition as required by MCL 712A.12. Although the trial court ordered personal service, respondent argues that petitioner presented insufficient evidence of the attempts made to find and serve respondent to demonstrate that petitioner made reasonable efforts before the trial court authorized service by certified mail or publication.

Service of the original petition for temporary custody does not, by itself, constitute adequate notice to meet the requirements of constitutional due process for the proceedings regarding the amended petition for permanent custody. Petitioner was able to file an amended petition under MCR 3.977(A)(2), which provides that a petitioner may seek termination of parental rights through an original, amended, or supplemental petition, and could amend the petition at any stage of the proceedings "as the ends of justice require." MCL 712.A.11(6). However, under MCL 712A.20, after an initial order places a child in temporary custody of the trial court, "the trial court [can]not subsequently proceed to termination without issuance and service of a fresh summons." *Atkins*, 237 Mich App at 251.

Petitioner urges this Court to analogize this case to the situation in *In re Dearmon*, 303 Mich App 684, 695; 847 NW2d 514 (2014), which held that "[o]nce personal jurisdiction was established, it did not evaporate merely upon the filing of the amended petitions . . . petitioner's preparation and filing of the amended petitions did not invalidate the personal jurisdiction that had already been obtained." Yet the circumstances in *Dearmon* were inapposite: in *Dearmon*,

the original petition sought termination of the respondent's parental rights, and the amended petitions included minor changes to the dates and details of allegations supporting the statutory grounds for jurisdiction. *Id*. By its plain language, MCL 712A.20 clearly precludes any continued personal jurisdiction over respondent for an amended petition newly seeking termination of parental rights on the basis of service of the original petition alone. Furthermore, in *Dearmon*, the original petition conferred jurisdiction over the respondent because it afforded the respondent with notice of the nature of the proceedings. *Dearmon*, 303 Mich App at 695. In contrast, petitioner's original petition for temporary wardship did not afford respondent with notice of the nature of the ensuing *termination* proceedings after the amended petition was filed.

Nevertheless, the trial court once again obtained personal jurisdiction over respondent under MCL 712A.13. This exception to the personal service requirement provides for service by registered mail, or publication, if personal service cannot be effectuated. Here, personal service was attempted. The trial court recognized, on the record, that service was required for the amended petition, and ordered personal service, along with the use of certified mail and publication at the second pretrial hearing. The foster care worker attempted to meet respondent at her address provided in August of 2018, but respondent was not home. Personal service was also attempted in October of 2018, but was unsuccessful.

Respondent alleges that her whereabouts were reasonably ascertainable, such that the failure to personally serve her effectively denied her due process. "Notice by publication is not constitutionally adequate with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Dow v State of Michigan*, 396 Mich 192, 208; 240 NW2d 450 (1976) (quotation marks and citation omitted). However, the record indicates not only that respondent's contact information was not easily ascertainable, but also that repeated, varied efforts to determine her whereabouts were fruitless. Respondent knew that child custody proceedings were ongoing, as evidenced by her attendance at the first pretrial hearing. Respondent was informed that petitioner was considering filing an amended petition for permanent custody when she was present at the first pretrial hearing, and had been asked to provide her updated contact information at that time. The foster care worker gave respondent her contact information so that respondent could initiate contact, yet respondent did not initiate contact. Less than a month later, a second pretrial hearing was held at the exact date and time scheduled at the previous pretrial meeting, but respondent did not attend. It was determined that the address she had given to both her counsel and to petitioner at the first pretrial hearing was inaccurate, and both respondent's counsel and petitioner were unable to reach respondent at the telephone number respondent had provided. During one attempted telephone call, a male voice answered the foster care worker's call to respondent's alleged telephone number, and informed the foster care worker that the number did not belong to respondent.

Additionally, the record demonstrates the trial court attempted to determine alternate contact information for respondent, to no avail. The trial court and petitioner queried the foster care worker and respondent's attorney at the second and third pretrial hearings whether there was updated contact information available for respondent, but the foster care worker and respondent's attorney were unable to reach her. LRR's father was also unreachable by both his counsel and petitioner, and thus could not have provided respondent's updated contact information. Respondent did not contact the foster care worker to exercise her ability to have

supervised visits with LRR at any point during the proceedings, despite being given the foster care worker's contact information. Respondent's whereabouts were by no means easily ascertainable.

Respondent further contends that the trial court improperly determined that alternative service by certified mail, or publication, was sufficient by relying on insufficient evidence of petitioner's efforts to find and serve respondent. Additionally, respondent alleges that the trial court was required to make the finding that personal service was impracticable, or could not be completed, on the basis of testimony or a motion and affidavit under MCR 3.920(B)(4)(b) before attempting proper service by certified mail or publication under MCL 712A.13. However, respondent's argument mischaracterizes the attempts made by petitioner, and incorrectly imposes limits on the potential evidence available to the trial court to make such a factual finding. Respondent claims that the foster care worker did not explain why she did not attempt to go to respondent's house, but the foster care worker testified that she did attempt to visit respondent's address in October of 2018. Respondent also highlights the unpublished opinion of *In re E Mallett, Minor*, unpublished per curiam opinion of the Court of Appeals, issued June 15, 2017 (Docket No. 335758), p 2.[1] In so doing, respondent implies that the trial court improperly relied on the efforts of respondent's counsel to locate respondent in determining that reasonable efforts were made to serve respondent. However, even if we were to consider this unpublished opinion, the burden was not exclusively on respondent's counsel: both petitioner's counsel and the foster care worker detailed their efforts to locate respondent to the trial court.

Furthermore, when evaluating MCL 712A.13 and MCR 3.920(B)(4)(b), this Court has previously concluded "it is evident that a trial court is permitted to consider evidence other than testimony or motions and affidavits when determining whether personal service was impracticable." *In re SZ*, 262 Mich App 560, 569; 686 NW2d 520 (2004). It was not clearly erroneous for the trial court to determine that personal service could not be effectuated after personal service was unsuccessfully attempted, certified mail was returned as undeliverable, multiple telephone contacts by petitioner and respondent's counsel went unanswered, and an unknown individual declared that the number provided by respondent to the foster care worker was no longer respondent's telephone number. Additionally, before making the determination that reasonable efforts were made by petitioner to serve respondent, the trial court queried the petitioner's counsel and obtained testimony from the foster care worker about the various attempts at communication and service. Petitioner presented sufficient evidence to support the trial court's finding that personal service could not be completed, and that service of process was attempted by sufficient alternative means under MCL 712A.13.

Respondent also alleges that she was never provided with real service of process in this matter, "so she never again appeared in court and was not advised of the court proceeding dates." Respondent correctly notes that actual notice of termination proceedings does not cure a jurisdictional defect. *In re Brown*, 149 Mich App 529, 541; 386 NW2d 577 (1986). However,

[1] Unpublished opinions lack precedential value. MCR 7.215(c)(1); *People v Reid*, 233 Mich App 457, 474; 592 NW2d 767 (1999).

we find no support for respondent's argument that she never returned to court because of an alleged lack of service of the amended petition. Respondent was aware that child custody proceedings were in progress concerning LRR. Respondent was informed, in person, that petitioner was planning on amending the petition to seek permanent custody, was provided an opportunity to share her accurate contact information, and was told the exact date and time of the upcoming hearing date—yet did not attend. Nor did respondent reach out to the foster care worker despite having her contact information and being informed of the right to visit LRR during the proceedings. Respondent had the opportunity to participate in the termination proceedings, yet elected not to do so.

III. CONCLUSION

The trial court provided sufficient notice of the permanent custody petition under MCL 712A.13 to meet constitutional due process requirements, and did not err in terminating respondent's parental rights.

Affirmed.

/s/ Michael J. Riordan
/s/ David H. Sawyer
/s/ Kathleen Jansen