S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

UNPUBLISHED
May 28, 2013

In the Matter of N. SCOBLE, Minor.

No. 313221
Kalamazoo Circuit Court
Family Division
LC No. 2011-000380-NA

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

Respondent appeals as of right the trial court order terminating his parental rights to the minor child, arguing that the trial court violated his due process rights by refusing to allow him to participate in the termination hearing. I would reverse and remand to provide for such an opportunity and so respectfully dissent.

Whether a child protective proceeding complied with a person's right to due process is a question of constitutional law reviewed de novo. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009).

At the preliminary hearing on November 28, 2011, the minor child's mother identified respondent as the sole putative father and stated that she did not know his whereabouts. The trial court noted the need to serve respondent with a Notice to Putative Father and stated, "Obviously, we're going to need an affidavit of efforts to locate Shawn Newnum within seven days. In the event we are not able to locate his whereabouts, we will – I will authorize publication of notice to him . . . ."

Per MCR 3.921, a Notice to Putative Father must include (a) the name of the child, the child's mother and the date and place of birth of the child; (b) that a petition has been filed with the court; (c) the time and place of hearing at which time the natural father is to appear to express his interest, if any, in the minor; and (d) a statement that a failure to attend the hearing will constitute a denial of interest in the minor, a waiver of notice of all subsequent hearings, a waiver of the right to appointed counsel and could result in termination of any parental rights. After service of such notice, the court may conduct a hearing and determine whether a preponderance of the evidence establishes that the putative father is the natural father and that justice requires that the putative father be allowed 14 days to establish his relationship.

Significantly, neither personal nor mail service on respondent was attempted prior to notice by publication on December 8, 2011. Moreover, contrary to the trial court's direction to DHS, the file does not contain an affidavit of efforts to locate respondent and there is no other evidence in the record indicating what, if any, efforts were made to locate respondent prior to service by publication. We note that given that respondent was incarcerated by the Michigan Department of Corrections, it is highly likely that a check of the Offender Tracking Information System, readily available on the DOC website, would have revealed his whereabouts.[1]

As the trial court indicated at the November 28, 2011 hearing, notice by publication may not be employed absent compliance with MCR 3.920(B)(4)(b) which provides that alternative service may only be employed "[i]f the court finds, on the basis of testimony or a motion and affidavit, that personal service of the summons is impracticable or cannot be achieved." The record contains no such testimony, motion or affidavit. Thus, on this record, the published notice on December 8, 2011, was not sufficient to comply with the court rules or to meet the requirements of due process.

Respondent did not appear at the December 29, 2011 hearing. The referee issued an Order After Pretrial Hearing setting the adjudication trial for January 12, 2012. The order included the typical form-printed requirement that notice be given to the putative father and contained in handwriting the notation, "send notice to: 6123 Abby St, Kalamazoo, MI." As the referee failed to turn the recording device on during the hearing, we have no record of what was said that prompted this handwritten notation. Again, as respondent was incarcerated he was not living at that address.

On January 10, 2012, the trial court entered an order stipulated to by the prosecutor, the mother's attorney and the attorney for the child. The order adjourned the trial from January 12, 2012 to a date to be determined. It does not appear that anyone attempted to serve respondent with this notice of adjournment. However, a hearing did in fact occur on January 12, 2012. At that hearing, the mother admitted several of the allegations in the petition and the court took temporary jurisdiction over the child. As to respondent, the court stated:

> In terms of the putative father, please make sure that he is notified and provided proper notice. If the Department of – or excuse me, if the Prosecutor's office is going to pursue a child support action against him, please do so relatively soon . . . so that we will know whether or not we're gonna need to, you know, pursue a termination and offer the services necessary for him . . . . I'm going to direct, also, the DHS to prepare a parent-agency treatment program for the mother, not for the father as he's putative at this point in time. If, between now

[1] Checking the Offender Tracking Information System is listed as one of the nine "required actions" to establish that diligent efforts were made to locate an absent parent in the SCAO-CWS Resource Materials. See State Court Administrative Office, Child Welfare Services Division, *Michigan Absent Parent Protocol: Identifying, Locating and Notifying Absent Parents in Child Protective Proceedings* (January 31, 2008), § D(2), p 7, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/APP.pdf.

> and then, he signs an affidavit of parentage, and the – the mother does as well, then I will direct you to . . . prepare one for the Court's adoption. But, otherwise, or in the interim somehow he's made legal father, also prepare one, but otherwise do not do that. Just notify him.

Following that hearing, the trial court entered an Order of Adjudication. The order listed respondent as putative father and set a review hearing for February 16, 2012. The proof of first class mail service of this order dated February 1, 2011 still lists the respondent's address as 6123 Abbey Street, Kalamazoo. The review hearing was conducted as scheduled and the transcript reveals substantial discussion concerning mother's compliance issues. However, the respondent is not mentioned at all, not by name or by status as putative father. The Order Following Dispositional Review set the next review hearing for April 17, 2012 and indicated that respondent had not waived his right to notice or his right to an attorney prior to termination of his parental rights.

This order was served by first class mail on March 20, 2012 to respondent at Ionia Correctional Facility. As the published notice was not proper and the other notices were sent to incorrect locations, this was the first proper service on the respondent. However, the documents served at this time did not include a Notice to Putative Father directing that he should attend the hearing to state his interest, if any, in the child nor that a failure to appear at the hearing would constitute a waiver of any such interest.

On April 17, 2010, the court held the next review hearing. Appearing at the hearing were a foster care worker, the lawyer/guardian ad litem for the minor child, and counsel for the mother. Neither the mother nor the putative father appeared. The court heard reports of the mother's non-compliance with the parenting agreement. The court continued visitation and services to the mother. Near the end of the hearing the court noted: "The father, who, I believe, still remains putative at this point in time and has no legal standing. Make sure that all of the notices are – perfected to him, and we're going to go ahead and set it for another review date." The court signed an Order Following Dispositional Review which like the previous order listed respondent as the putative father but did not indicate that the putative father had been noticed and had failed to establish paternity and so waived his interest or rights. The order included notice of the next review hearing set for July 3, 2012. The proof of first class mail service shows that this order was mailed to respondent at Ionia Correctional facility on May 11, 2012.

The next review hearing was held on July 3, 2012. Counsel for the mother and the child appeared as did a Ms. Wheeler who appears to be a caseworker. The attorney for the child questioned Ms. Wheeler who reviewed continuing failures by the mother to comply with services. Near the end of the hearing, Ms. Wheeler was asked about respondent and she confirmed that respondent had communicated with her "expressing that he wants paternity testing done" but that she had been unable to accomplish the testing because the paternity clinic would not send a test kit into the prison without a court order permitting them to do so. Ms. Wheeler was asked if respondent had stated that "if it's his child he wants to be a father to this child?" She responded, "He doesn't say that specifically. He just states that he wants a paternity test." She further indicated that respondent had communicated with her by letter. However, she did not show any letters to the court and instead stated her recollections. The court asked Ms. Wheeler:

Q. Has he filed anything that you're aware of to pursue his paternity interest?

A. No, he has not.

Q. Did you advise him that if he wants to do that he needs to take action?

A. He just requested a paternity test, and then I told him that I would do what I could to get him the paternity test.

Q. Okay. It's his responsibility to file an action, a complaint for paternity.

A. Okay.

The trial court further stated that it would not give the order for a paternity test until respondent filed a complaint for paternity, and stated "so I will direct that you advise him to . . . take that action; that it's his responsibility to file a complaint for paternity."[2]

On July 20, 2012, the court signed an Order Following Dispositional Review, setting the next dispositional review hearing for September 25, 2012. This order, like the previous orders, listed respondent as the putative father but did not indicate that the putative father had failed to establish paternity or that he had waived his interest or rights. The order also provided: "The caseworker shall advise putative father that if he wants to perfect his interest he will have to file a paternity complaint." The order did not actually direct respondent to take any action, or warn of any consequences for failure to do so, or set forth a timeline for taking action. The proof of first class mail service shows that this order was mailed to respondent at Ionia Correctional facility on July 20, 2012.

On July 30, 2012, petitioner filed a supplemental petition seeking termination of the parental rights of both the mother and respondent. A summons and order setting the termination trial for August 30, 2012 was served on respondent by first class mail on August 1, 2012. Served

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[2] While there does not appear to be a statute or rule mandating that a trial court order paternity testing for a putative father who requests it, the trial court did not cite any law stating that a trial court may decline to order testing when requested because a paternity complaint has not been filed. Both the Office of Child Support and the DHS (through a contractor) provide paternity testing without cost to the putative father. See State Court Administrative Office, Child Welfare Services Division, *Michigan Absent Parent Protocol: Identifying, Locating and Notifying Absent Parents in Child Protective Proceedings* (January 31, 2008), § D(2), p 9-10, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/APP.pdf. In this case, the sole reason the paternity test was not done was because the putative father was incarcerated. DHS stated its willingness to proceed with the testing and given the putative father's willingness, testing would normally occur without a court order. The matter came to the court's attention in this case only because the putative father was incarcerated and the warden would not permit the testing to occur at the prison without a court order.

with the summons was a Notice to Putative Father which, as described above, stated that a petition requesting that the court take jurisdiction of the child had been filed and advising him that he must appear on August 30, 2012 "to state your interest, if any, in the child." It further stated, "Your failure to appear at this hearing: a) is a denial of your interest in the child, b) is a waiver of notice for all subsequent hearings, c) is a waiver of a right to appointment of an attorney, and d) could result in termination of whatever rights you may have to the child." The proof of service shows that personal service on the respondent took place at the prison on August 6, 2012.

Also on August 1, 2012, the court signed a Writ of Habeas Corpus, directing the DOC to bring respondent to the court for a hearing on August 30, 2012 from 10:30 am to 3:30 pm "to participate in a child protective proceeding – TERMINATION HEARING."

Appearing at the August 30, 2012 hearing were the respondent, the prosecutor, the foster care worker, the lawyer-guardian ad litem and counsel for the mother. The court asked respondent: "Mr. Newnum, have you perfected your interest as the legal father"? Mr. Newnum responded: "Um, I've wrote, I don't know who she is, but she writes me. She's like a – from someplace in Grand Rapids . . . I told them I need a DNA test, I don't even know if the kid is mine. But I would like to say on my behalf here, is ---."

At that point, the court interrupted respondent and stated, "Well, sir, you don't have any rights at this point in time. We've got to establish whether or not you've perfected your interest, because if you don't have . . . any rights, you don't have any standing to speak with regard to this matter. So, hold for a minute and let me find out whether or not we have a determination as to whether or not he's legal." A lengthy colloquy between the court, the attorneys and the case worker followed in which the case worker confirmed that respondent had been provided with a copy of the court's last order and that he had not taken action beyond the request for the paternity test. The court then invited respondent to speak and respondent said:

> I don't understand what they're saying, I ain't took no steps. I'm in prison. I wrote the people. I got a letter right here where I wrote the lady. My counselor told me to write it to get the DNA test. There's only so much I can do. I took parenting class; I just completed that. I'm in AA. I've been approved to go to RSAT. I don't know if you understand what that is; that's residential substance abuse treatment program. It's the most extensive program in the MDOC office. I got a parole; I'm on my way back home. So, I mean, I don't even know if I'm the father, but what I'm saying about the whole thing, is they saying I ain't did nothin'.

The court then stated that respondent had failed to follow the procedure of filing a complaint for paternity and had the officers remove him from the courtroom.

Given these events, I do not believe we can conclude that the procedures set out in MCR 3.921(D) were complied with, at least not sufficiently to afford respondent a meaningful opportunity to express his interest in the minor. The original publication of the Notice to Putative Father was improper, as were the first attempts to serve him through the mail. The documents he was served with thereafter never indicated that a failure to appear constituted a

waiver. The only Notice to Putative Father that was properly served on respondent directed him to appear at the August 30 hearing and state his interest in the child or to waive his interest in the child. He did as directed and sought to state his interest but was not permitted to do so. It is true that the previous order contained a statement (though it may have been hard to find and even harder for a layman to decipher) that the caseworker should direct respondent to file a complaint for paternity to perfect his interest in the minor child. However, the order was not directed at respondent, and did not set any time limit for him to file a complaint. Moreover, within two weeks he received a clear notice, telling him to simply come to the hearing on August 30 or waive his rights. There was no reason for respondent to believe that he needed to file a complaint for paternity prior to attending the August 30 hearing. He complied with the first order directed at preservation of parental rights but the trial court refused to allow him to state his interest.

Based on the Notice to Putative Father, respondent indicated by appearing at the termination hearing that he did not deny an interest in the child, nor waive his right to an attorney or his right to notice of subsequent hearings. The trial court violated respondent's right to procedural due process by terminating his parental rights without allowing him a meaningful opportunity to express his interest in the minor and to participate in the termination hearing, despite the fact that he complied with the Notice to Putative Father.

For these reasons, I would reverse and remand.

/s/ Douglas B. Shapiro