STATE OF MICHIGAN

COURT OF APPEALS

In re CORNWELL/ESPINO, Minors.

UNPUBLISHED
February 11, 2021

No. 354371
Wayne Circuit Court
Family Division
LC No. 09-489620-NA

Before: CAVANAGH, P.J., and SERVITTO and CAMERON, JJ.

PER CURIAM.

Respondent-father appeals as of right an order authorizing a petition requesting the termination of his parental rights to three minor children, arguing that his due process rights were violated because he was not provided a copy of the petition before the preliminary hearing was conducted. We affirm.

By petition dated July 8, 2020, the Department of Health and Human Services (DHHS) sought the termination of respondent's parental rights. In brief, the petition alleged that the termination of respondent's parental rights was sought, in part, because of sexual, emotional, verbal, and physical abuse.[1] While respondent had sole physical custody of the children since about 2014, a voluntary safety plan had been in place since January 2020 so that the children were living with their maternal grandmother when the petition was filed.

On July 10, 2020, a preliminary hearing was conducted. Before the proceedings began, the referee noted for the record that the hearing was being conducted by video and audio because of the COVID-19 pandemic. The maternal grandmother, mother, and respondent were noted to be present by phone—not video. Both respondent and the mother were represented by attorneys. The court confirmed with mother that she had received a copy of the petition by email and confirmed with respondent that he had not received a copy of the petition because he was having issues with his email. The court advised respondent that the petition would be mailed to his home by regular and certified mail, and that a process server would also deliver a copy of the petition. The court

[1] The petition also sought the termination of mother's parental rights but she is not a party to this appeal.

noted that respondent's attorney would likely email or mail respondent a copy as well. The court confirmed with respondent that he had some period of time that morning to confer with his attorney before the hearing began and reiterated that he would be receiving a hard copy of the petition, to which respondent replied: "Yes. Thank you."

Thereafter, Yolonda Johnson, the child protective services (CPS) caseworker who filed the petition testified about the allegations raised in the petition, including that one of the children—a 13-year-old—reported that respondent had sexually abused her (digital penetration) from the age of four or five until she was 12 years old. Another one of the children reported that respondent physically and verbally abused him by punching him and calling him vulgar names. And a third child reported being sexually abused (orally) by respondent's uncle who lived in the home and, although respondent was informed of this abuse, he did nothing and allowed the man to remain in the same home as the child. Johnson was subjected to cross-examination by the lawyer/guardian ad litem for the children, mother's attorney, as well as respondent's attorney. One of the questions asked by respondent's attorney was to confirm respondent's belief that one of the children suffered a broken arm while in her grandmother's care, demonstrating that respondent had spoken to his attorney.

No other witnesses were presented and, after Johnson's testimony, the court asked if the parties waived a formal reading of the petition. Respondent's counsel answered in the affirmative. The court then asked if the parties waived as to probable cause and respondent's counsel answered: "Waive as to probable cause and to the reading." The court then asked if there were any arguments to be made and respondent's counsel requested that respondent be allowed supervised visits with the children. The court then specifically gave mother and respondent the opportunity to ask any questions or make any statements that they wanted to add to the hearing. Respondent stated that he heard "a lot of stuff that isn't true" and he took notes. He said that mother had been with the children unsupervised three times, which he had reported. Respondent complained that he could not talk to his attorney or to the children's attorney during the hearing. The court explained to respondent that he could not speak to the children's attorney ever, but that he had an attorney with whom he could speak. Respondent told the court that mother owed child support and asked whether the children's interviews were recorded. The court advised respondent that it was clear from the testimony that mother had not paid child support and that he could talk to his attorney about whether the interviews were recorded. Respondent stated that his issues were "the constitutionality of this Hearing. I can't talk to my Lawyer during the Hearing, and there is no cross-examination by my Attorney, really."

Thereafter, the referee repeated that respondent would be served with the petition through regular mail, certified mail, and personal service. The referee concluded that it was clearly contrary to the welfare of the children to remain in respondent's care, that reunification efforts need not be made, and that there was sufficient probable cause to authorize the petition. A pretrial hearing was scheduled for July 28, 2020. Respondent's appeal followed.

Respondent's sole argument on appeal is that his due process rights were violated because he was not provided with a copy of the petition requesting the termination of his parental rights before the preliminary hearing was conducted. We disagree.

"Whether child protective proceedings complied with a parent's right to procedural due process presents a question of constitutional law, which we review de novo." *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014). The interpretation and application of court rules is also reviewed de novo, "using the same principles that govern statutory interpretation." *Id*. at 404.

To properly preserve an issue for appeal, a party must object at a time when the court can correct the error. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008); *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). An issue is considered forfeited—and treated as unpreserved—if a party fails to timely assert a right in the trial court, but an issue is considered waived if a party relinquished or abandoned a right by affirmative act—extinguishing any error. *In re Ferranti*, 504 Mich 1, 25; 934 NW2d 610 (2019); *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). While it is arguable that respondent waived any error related to the failure to serve him with a copy of the petition before the preliminary hearing was conducted, we will consider the issue as unpreserved. An unpreserved error is reviewed for plain error. *Carines*, 460 Mich at 763. To establish plain error warranting appellate relief an error must have occurred, that was clear or obvious, and affected respondent's substantial rights. *Id*.

With regard to child protective proceedings, as set forth in MCR 3.961(A), unless there are exigent circumstances "a request for court action to protect a child must be in the form of a petition." A "petition" is generally a complaint that "a parent, guardian, nonparent adult, or legal custodian has harmed or failed to properly care for a child[.]" MCR 3.903(A)(20). Generally, once such a petition is received by the court, the court must either "authorize" it to be filed by the clerk of the court as a public record, or deny authorization of the petition—essentially dismissing it as insufficient or nonactionable. See MCR 3.903(A)(21). "Granting permission to file the petition is merely a determination that the petition is sufficient to be 'delivered to, and accepted by, the clerk of the court.' " *In re Kyle*, 480 Mich 1151; 746 NW2d 302 (2008), quoting MCR 3.903(A)(9) and citing MCR 3.903(A)(20). The court's determination whether to "authorize" the filing of the petition can occur either by "preliminary inquiry" or "preliminary hearing."

Under MCR 3.962, if the petition does not request placement of the child and the child is not in temporary custody, the court may conduct a "preliminary inquiry" to determine the proper action to take on the petition. MCR 3.962(A); see also *In re Ferranti*, 504 Mich at 15 n 6; *In re England*, 314 Mich App 245, 263; 887 NW2d 10 (2016). This inquiry need not occur on the record and the parties need not be present. MCR 3.962(B). This preliminary inquiry may result in the court: denying authorization of the petition, referring the matter to alternative services, or authorizing the filing of the petition with the clerk of the court. MCR 3.962(B); MCR 3.903(A)(21). A court may authorize the filing of the petition if the petition comports with MCR 3.961(B) and if the court can determine that probable cause exists to believe that one or more of the petition allegations are true, supporting the court's exercise of jurisdiction under MCL 712A.2(b). MCR 3.962(B); see also *In re Ferranti*, 504 Mich at 15 & n 6.

In the alternative, if the petition requests placement of the child outside the home or the child is already in temporary custody, or if a probable-cause determination cannot be made by preliminary inquiry, the court must conduct a "preliminary hearing" under MCR 3.965 to determine whether to authorize the filing of the petition with the clerk of the court. See *In re Ferranti*, 504 Mich at 15 & n 6. The primary purpose of the "preliminary hearing" is to make a probable-cause determination, i.e., to determine whether probable cause exists to believe that one

or more of the petition allegations are true, supporting the court's exercise of jurisdiction under MCL 712A.2(b). See MCR 3.965(B)(12). If the petition is authorized, the court may also order temporary placement of a minor child. *Id*.

In this case, a preliminary hearing was conducted. The CPS caseworker testified at length about the allegations set forth in the petition involving all three minor children, including sexual, physical, emotional, and verbal abuse. Following the testimony of the CPS caseworker, respondent's counsel specifically waived a formal reading of the petition and also waived probable cause. In other words, it was uncontested by respondent that probable cause existed sufficient for the court to authorize the petition.

On appeal, respondent claims that his due process rights were violated because he had not received a copy of the petition before the preliminary hearing was conducted. But respondent fails to cite to any legal authority establishing that the failure to serve a respondent in a child protective proceeding with the petition before a preliminary hearing is conducted amounts to a due process violation. MCR 3.965, which governs preliminary hearing proceedings in child protective proceedings, provides that the court must determine if the parent was notified of the hearing. MCR 3.965(B)(1). If not, the matter *may* be adjourned, but it may also proceed if notice was given or if there was a reasonable attempt to provide notice. *Id*. In other words, a respondent's appearance is not even mandatory for a preliminary hearing to be conducted. And it is clear that respondent had notice of the hearing because he was in attendance by telephone. But MCR 3.965(B)(4) does state: "If the respondent is present, the court must assure that the respondent has a copy of the petition. The court must read the allegations in the petition in open court, unless waived." In this case, the court determined that respondent did not have a copy of the petition, although an attempt was made to provide him one through email.[2] Respondent explained to the court that he "was having issues with" his email. But MCR 3.965(B)(4) does not mandate adjournment if the respondent does not have a copy of the petition. And, in fact, neither respondent nor his counsel requested an adjournment of the preliminary hearing.

Further, respondent was represented by counsel at the preliminary hearing, counsel had a copy of the petition, and it was clear that respondent had the opportunity to speak with his attorney before the preliminary hearing was conducted. And although the court offered to read the allegations set forth in the petition in open court, that reading was waived by respondent through his counsel. At no time during the preliminary hearing did respondent state that he was unaware of the allegations raised in the petition. And again, respondent has provided no legal authority to support his claim that due process required that he have a copy of the petition before the court could hold a preliminary hearing to determine if the petition should be authorized.

Moreover, the children had been removed from respondent's home in January 2020—after the children reported respondent's abusive behavior—and were living with a grandmother at the

[2] Because of the COVID-19 pandemic, the proceedings had to be conducted by video and audio—not in person. And mother, who was also present at the preliminary hearing, confirmed that she received a copy of the petition by email.

time of the preliminary hearing, in accordance with a safety plan which was agreed to by respondent months before these proceedings. MCR 3.920(D)(2)(b) states:

> When a child is placed outside the home, notice of the preliminary hearing . . . must be given to the parent of the child as soon as the hearing is scheduled. The notice may be in person, in writing, on the record, or by telephone.

Thus, respondent received the notice of the preliminary hearing to which he was entitled. The court rule does not further require the service of the petition before a preliminary hearing may be conducted. And the court advised respondent that the petition would immediately be sent by both regular and certified mail, as well as personally served.

However, even if the court did err in proceeding with the preliminary hearing before respondent had a copy of the petition—although we do not believe it did—respondent's substantial rights were not affected. Respondent argues that if he had advance notice of the petition allegations, he "would have had the opportunity to challenge DHHS's assertions" and "prepare a defense." But, again, the purpose of a preliminary hearing is for the court to decide whether to authorize the filing of the petition. MCR 3.965(B)(12). "The court may authorize the filing of the petition upon a showing of probable cause, unless waived, that one or more of the allegations in the petition are true and fall within MCL 712A.2(b)." *Id*. Respondent's counsel did waive probable cause. In any case, considering the testimony of the CPS caseworker and the seriousness of the allegations set forth in the petition, including severe and repeated sexual abuse, as well as physical, emotional, and verbal abuse, involving all three minor children, probable cause to authorize the petition clearly existed. And contrary to respondent's argument, the children were not permanently removed from his care after the preliminary hearing; rather, the children were removed temporarily to ensure their safety until further proceedings could be conducted.

Respondent's argument appears to confuse the preliminary hearing with the adjudication phase of a child protective proceeding. It is during the adjudication phase that the issue is "whether the trial court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights." *In re Ferranti*, 504 Mich at 15. At that time, a respondent-parent can either enter a plea to the petition allegations or contest them. If the allegations are contested, a respondent-parent is entitled to a trial and "the petitioner has the burden of proving by a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition." *Id*. (quotation marks and citation omitted). In any case, respondent has not established that he is entitled to appellate relief under the circumstances of this case.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Thomas C. Cameron