STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 29, 2011

In the Matter of NAAB, Minors.

No. 303200
Kalamazoo Circuit Court
Family Division
LC No. 2009-000113-NA

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating her parental rights to her minor children under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), and (g). We affirm.

Respondent argues that her due process rights were violated when the lower court accepted her waiver of timely service of the termination petition without determining whether her waiver was freely, voluntarily and understandingly made. Because she did not preserve this issue for appeal, our review is limited to plain error affecting her substantial rights. See *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009). A parent's right to the custody of her children is an element of liberty protected by due process guarantees. See *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982); *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). Whether a parent was deprived of due process is determined case by case, but statutes, court rules, and agency policies "provide an important point of departure for this inquiry." *In re Rood*, 483 Mich 73, 122; 763 NW2d 587 (2009).

By statute and court rule, respondents must receive written notice of a termination hearing at least 14 days before the hearing. MCL 712A.19b(2)(c); MCR 3.977(C)(1); MCR 3.920(D)(3)(b). Failure to provide timely service makes the proceedings void. *In re Atkins*, 237 Mich App 249, 250-251; 602 NW2d 594 (1999). Respondents must also be served with a summons at least 14 days before the hearing. MCR 3.920(B)(2)(b); MCR 3.920(B)(5)(a)(i). However, respondents may waive notice and service in writing. MCR 3.920(F).

At the September 2, 2010, termination hearing, the following exchange took place:

> *Court.* Okay.
>
> Evidentially [sic], it came to somebody's attention in the court today that the mother may not have been timely served with the petition and summons. I believe it may have been held up in—at the prison end of things. We're not

exactly sure what happened, but the paperwork got lost or misplaced. So,—but she, I believe, has received the summons and petition but it was not the—

Respondent's Counsel. Your honor, it's my understanding that she did receive the petition. It was just a couple of days ago.

Court. Okay.

Respondent's Counsel. Obviously, that's not within the time frame allotted by statue [sic]. She has signed the waiver of notice.

Court. Oh, she has. Okay.

Respondent's Counsel. I did discuss that with her and indicated that if she chooses not—if she chose not to do that they could delay the matter.

Court. Thank you. I was looking at a blank one by mistake.

Respondent's Counsel. But she would—she chose to go ahead and go forward with the hearing today in order to resolve matter [sic], rather than to artificially delay things.

Court. Thank you and we appreciate that—

Respondent. Yes, Ma'am.

Court. —that the mother did sign that. Thank you.

Respondent signed a "Waiver of Summons/Notice of Hearing" form, which stated that she waived service "knowingly, voluntarily, and understandingly." Respondent does not cite any authority requiring the court to make further inquiries. Her attorney's statements were not sufficient reason for the court to believe the waiver was not knowingly and understandingly made. Respondent waived timely notice and service. See MCR 3.920(F). Respondent also waived defects in service by appearing and participating in the hearing without objecting on the record. See MCR 3.920(H).

Respondent argues further on appeal that her attorney's advice to sign the waiver constituted ineffective assistance of counsel. The principles of ineffective assistance of counsel developed in criminal proceedings apply to child protective proceedings. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002). Because respondent did not move for a new termination hearing or request an evidentiary hearing, our review is limited to any mistakes apparent on the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Respondent's right to effective assistance was violated only if her attorney's performance fell below an objective level of reasonableness and she was denied a fair hearing as a result. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Her attorney's advice was reasonable. Respondent had actual notice of the hearing at least a month earlier. Although any delay would have allowed her to make more progress on her treatment plan, her attorney might

also have been concerned that not signing a waiver would make her appear uncooperative. Further, it is impossible to know whether the attorney predicted the delays that did occur.

Regardless, respondent was not denied a fair hearing because it was not probable the outcome would have been different had she not signed the waiver. See *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The termination hearing continued nearly two months later on October 28, 2010, when respondent testified. At that time, the lower court did not find clear and convincing evidence of statutory grounds to terminate respondent's rights; it found the grounds established only by a preponderance of the evidence. The court then allowed respondent three more months to demonstrate that she could live substance-free. She unfortunately failed a breathalyzer and was awaiting sentencing for violating her probation when her rights were terminated at a January 25, 2011, hearing. It is difficult to see how delaying when the termination hearing began could have possibly changed the outcome.

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Jane M. Beckering