STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
March 15, 2012

In the Matter of JMR, Minor.

No. 305515
Menominee Circuit Court
Family Division
LC No. 2010-000509-AN

Before: METER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating his parental rights to the minor child, his son JMR, under MCL 710.39(1). We reverse and remand.

Petitioners, JMR's guardians, filed a petition to terminate respondent's parental rights and adopt JMR.[1] Respondent filed a petition to terminate petitioners' guardianship. The trial court denied respondent's petition, terminated respondent's parental rights, and authorized JMR's adoption. Respondent filed a motion for rehearing, which was denied by the trial court. Respondent then filed this appeal, arguing that the trial court erred in terminating his parental rights under MCL 710.39(1).

MCL 710.39 states:

> (1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.

[1] JMR's biological mother had been petitioners' foster child. She released her parental rights to the minor child so that petitioners could adopt him.

> (2) If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with the putative father's ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with [MCL 710.51(6)] or [MCL712A.2].
>
> (3) If the parental rights of the mother are terminated pursuant to this chapter or other law and if the court awards custody of a child born out of wedlock to the putative father, the court shall enter an order granting custody to the putative father and legitimating the child for all purposes. . . .

The circuit court's reliance on MCL 710.39 to terminate respondent's parental rights was misplaced because MCL 710.39 applies only to putative fathers. Compare MCR 3.903(A)(7) and (24). The circuit court record contains an Order of Filiation, dated August 1, 2008,[2] which establishes respondent as the legal father of JMR. See, e.g., *In re LE*, 278 Mich App 1, 19; 747 NW2d 883 (2008). Because respondent was JMR's legal father, termination of his parental rights under MCL 710.39 was in error. Termination of parental rights of a legal father under the Adoption Code is allowable if a stepparent adoption is involved, see MCL 710.51(6), but such a situation is not present in this case. Petitioners should have instead filed a petition to terminate respondent's parental rights under the juvenile code, MCL 712A.19b, based on allegations of neglect. Thus, the circuit court erred in terminating respondent's parental rights and authorizing petitioners' adoption of JMR.

Respondent also argues that the circuit court violated his due process rights because he did not receive any documents or paperwork until after his parental rights were terminated and his child was adopted. Whether a respondent has been deprived of his right to due process is a constitutional issue that we review de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). Parents have a significant interest in the custody of their children and that interest is an element of liberty protected by due process. *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). Due process demands notice and an opportunity to be heard, as well as fundamental fairness. *Rood*, 483 Mich at 92.

By statute and court rule, a parent 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 notice makes the proceedings void. *In re Atkins*, 237 Mich App 249, 250-251; 602 NW2d 594 (1999). In addition, a respondent must 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, a party may waive defects in service by appearing and participating in the hearing without objecting on the record. MCR 3.920(H).

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[2] According to the Order of Filiation and Support, the child's biological mother signed an Affidavit of Parentage on April 10, 2008.

Here, the lower court file contains a proof of service by mail of the petition for adoption filed by petitioners; the certified mail return was signed by respondent on January 31, 2011. It was filed with the trial court on May 11, 2011. The file does not show that respondent was provided with notice of the hearing. However, respondent was present at the February 16, 2011, hearing and specifically acknowledged that he had received notice of the hearing. Also, one of the petitioners testified that she served, by certified mail, the notice of the hearing, the petition for adoption, and two different forms for termination of parental rights on respondent in time for the February 16, 2011, hearing. Furthermore, respondent was in court on February 16, 2011, when the continuation date was set for May 23, 2011. It is clear that respondent had actual notice of the May 23, 2011, hearing, and that he participated in the hearing.[3] His appearance and participation waived any defects in service. There was no due process violation based on lack of service.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[3] The substantive testimony and arguments occurred on May 23, because the guardian ad litem was not prepared to proceed on February 16.