

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
June 19, 2012

In the Matter of A. K. BELL, Minor.

No. 307377
Wayne Circuit Court
Family Division
LC No. 02-408229-NA

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

The trial court terminated the respondent-father's parental rights and permitted the minor child's adoption despite that no one served notice on respondent regarding the proceedings. A parent facing termination of his parental rights must be personally served with notice. This fundamental due process principle is enshrined in Michigan's statutes and our Court Rules. Respondent was never personally served with the petition seeking termination of his parental rights, or with notice of any of the subsequently-conducted hearings. Nevertheless, after a brief ex parte proceeding a hearing referee recommended termination of respondent's parental rights and a circuit judge later accepted that recommendation. The failure to personally serve respondent rendered the circuit court proceedings void. Accordingly, we vacate the orders terminating respondent's rights and permitting the child's adoption. On remand, the circuit court is directed to ensure that respondent is notified of all proceedings in accordance with the principles set forth in this opinion.

I. UNDERLYING FACTS AND PROCEEDINGS

AKB, the minor child, was born in September 2001. In April 2002, the Department of Human Services (DHS) filed a temporary custody petition averring that AKB's mother had allowed a friend to babysit AKB, and the friend admitted to severely beating the child. The petition identified respondent as AKB's "putative father," and noted that he "does not pay child support but has frequent visits with her." The petition included no other allegations concerning respondent. Shortly after the 2002 petition was filed, respondent and AKB's mother executed an affidavit of parentage. The court acquired jurisdiction based on the mother's no-contest plea to several petition allegations.

In 2003, the circuit court terminated its jurisdiction and the mother regained AKB's custody. The respondent mother and AKB resided with Angela Milligan, AKB's maternal grandmother. Ultimately, in January 2009, Milligan became AKB's legal guardian. And in March 2011, a probate judge signed an order granting Milligan authority to adopt AKB.

On August 10, 2011, Milligan petitioned for permanent custody of AKB. In the petition, Milligan incorrectly asserted that respondent had not established paternity of the child, but correctly averred that he resided on Patricia Street in Detroit. Milligan's petition sought termination of both parents' rights pursuant to MCL 712A.2(b)(5), which permits a circuit court to terminate parental rights when a child has a guardian and both of the following criteria have been proved:

(A) The parent, having the ability to support or assist in supporting the [child], has failed or neglected, without good cause, to provide regular and substantial support for the [child] for 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for 2 years or more before the filing of the petition.

(B) The parent, having the ability to visit, contact, or communicate with the [child], has regularly and substantially failed or neglected, without good cause, to do so for 2 years or more before the filing of the petition.

On August 15, 2011, the circuit court mailed a summons to respondent father, informing him of a pretrial hearing scheduled for August 25, 2011. A "return of service" in the record states that respondent was also served by certified mail, yet, the record does not include any verification of a certified mailing.¹ On August 25, 2011, a referee conducted a pretrial hearing. Respondent did not attend. After identifying the parties in attendance, the referee stated:

The court clerk has determined that a date of October 25, 2011 at 10:00 is appropriate for—timewise, so that all forms of service can take place on the father. The address that we have is 1100 South Patricia Street, Detroit, 48217. That's still a good address, if anyone knows?

A foster care caseworker responded affirmatively. The referee then signed a "jurist's report" providing for "all forms of service on father." On September 1, 2011, a circuit court judge signed an order confirming that "all forms of service needed for father."

On September 22, 2011, the *Detroit Legal News* published notification that a hearing on Milligan's "guardianship petition" would be conducted on October 25, 2011. The notice named respondent, and further provided that the hearing "may result in the termination of your parental rights[.]" No record evidence supports that respondent was personally served with notice of the October 25, 2011 hearing. Inexplicably, the court did not even attempt to mail respondent a notice of this hearing despite the court's awareness of his address.

¹ Proof of service for termination proceedings must be made as contemplated in MCR 2.104(A). MCR 3.920(I). Petitioner filed no "written acknowledgment of the receipt of a summons" signed by respondent as required by MCR 2.104(A)(1). Even if service by certified mail were appropriate under the circumstances, petitioner would be required to attach "[a] copy of the return receipt signed by the" respondent to prove service. MCR 2.105(A)(1).

At the October 25, 2011 hearing, the referee announced that AKB's mother had voluntarily released her parental rights and consented to Milligan's adoption of the child. The referee continued, "The, um—the record should reflect that there is an affidavit of publication in the file on the biological father. Are there any other matters to come to the Court's attention prior to going on the record?" When none were offered, the referee entertained Milligan's testimony. Milligan denied that respondent had provided AKB with any support during the preceding two years and claimed that he had also failed to visit the child during that time. Following the hearing, the referee recommended that respondent's parental rights be terminated. Two days later, on October 27, 2011, a circuit court judge signed an order terminating respondent's parental rights.

II. ADOPTION V JUVENILE CODE

Respondent challenges the court's termination of his parental rights under the Juvenile Code, MCL 712A.1 *et seq.*, as opposed to the Adoption Code, MCL 710.21 *et seq.* However, the court properly proceeded under the Juvenile Code provisions and respondent's challenge completely lacks merit.

Termination of parental rights is pursued under the Adoption Code when a parent or legal custodian voluntarily initiates a proceeding, but under the Juvenile Code when the proceeding is brought involuntarily against the parent by the state. *In re Jackson*, 115 Mich App 40, 51; 320 NW2d 285 (1982). Before a child can be adopted, the parents must release their parental rights, MCL 710.28(1)(a), or consent to the adoption. MCL 710.43(1)(a). If a child is born out of wedlock, the mother can release her parental rights and the DHS may pursue termination against the father under the Juvenile Code. But the child may not be adopted until the father releases his rights or his rights are involuntarily terminated. MCL 710.31. A putative father's parental rights can be terminated under the Adoption Code. See MCL 710.37; MCL 710.39(1). However, a *legal* father's parental rights can be terminated under the Adoption Code *only* when the mother has legal custody of the child, is married, and her husband seeks to terminate the father's parental rights for purposes of stepparent adoption. MCL 710.51(6). Otherwise, a legal father's parental rights must be terminated under MCL 712A.19b(3) of the Juvenile Code.

Because respondent had established paternity in 2002, he was AKB's legal father, MCR 3.903(A)(7)(e), not her putative father, see MCR 3.903(A)(24). Moreover, the child's mother did not have legal custody at the time of the termination petition, let alone have a new husband who wanted to adopt AKB. Thus the maternal grandmother and the DHS could not proceed under the Adoption Code to terminate respondent's parental rights. Rather, because AKB had a legal guardian who alleged that both parents failed to support or maintain a relationship with her, the statutory grounds for jurisdiction and termination under the Juvenile Code, MCL 712A.2(b)(5); MCL 712A.19b(3)(f), were applicable. The mother released her parental rights and the proceedings under the Juvenile Code continued with respect to respondent alone.

III. NOTICE

Respondent further contends that the court could only terminate his parental rights after "full and proper notice" of the proceedings. Natural parents have a "fundamental liberty interest in the care, custody, and management of their child[ren]," and the state must therefore meet a

high burden before terminating an individual's parental rights. *Santosky v Kramer*, 455 US 745, 753-754; 102 S Ct 1388; 71 L Ed 2d 599 (1982). The importance of a parent's "essential" and "precious" right to raise his child is well-established in our jurisprudence. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). Because "[t]his right is not easily relinquished," "to satisfy constitutional due process standards, the state must provide the parents with fundamentally fair procedures." *Id.* (internal quotation marks omitted). As our Supreme Court acknowledged in *Hunter*, "where the parental interest is most in jeopardy, due process concerns are most heightened." *Id.* at 269.

The Legislature requires that a parent named in a termination petition receive personal service of a summons before the court may conduct a hearing:

After a petition shall have been filed and after such further investigation as the court may direct . . . the court may dismiss said petition or may issue a summons reciting briefly the substance of the petition, and requiring the person or persons who have the custody or control of the child, or with whom the child may be, to appear personally and bring the child before the court at a time and place stated: Provided, That the court in its discretion may excuse but not restrict children from attending the hearing. If the person so summoned shall be other than the parent or guardian of the child, then the parents or guardian, or both, shall also be notified of the petition and of the time and place appointed for the hearing thereon, *by personal service* before the hearing, except as hereinafter provided. Summons may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary.

Any interested party who shall voluntarily appear in said proceedings, may, by writing, waive service of process or notice of hearing. [MCL 712A.12 (emphasis added).]

Statutes requiring service of notice to parents must be strictly construed. *In the Matter of Kozak*, 92 Mich App 579, 582; 285 NW2d 378 (1979). In *In re Brown*, 149 Mich App 529, 537; 386 NW2d 577 (1986), this Court held that MCL 712A.12 mandates personal service of a summons on a parent facing termination of parental rights. The Court emphasized that personal service not only affords a parent notice, but also apprises the parent of the charges levied against him and affords a reasonable time to prepare a defense. *Id.* at 541-542. In the absence of personal service or a waiver of personal service, jurisdiction is not established and the court's orders are void. *Id.* at 542. Notably, this Court determined in *Brown*, "the fact that respondent had actual notice does not cure this jurisdictional defect." *Id.* at 541.

In *In re Adair*, 191 Mich App 710; 478 NW2d 667 (1992), this Court reaffirmed its holding in *Brown*, finding a jurisdictional defect where a noncustodial parent incarcerated outside Michigan had not been personally served with notice of the adjudication trial and dispositional hearing. In *Adair*, the circuit court had permitted the petitioner to employ notice by publication to inform respondent of the proceedings. This Court observed that "[w]hile MCL 712A.13 . . . allows for alternative methods of service of process, it still requires that the trial court first determine that personal service is impracticable." *Id.* at 714. Because "nothing in the lower court record indicate[d] that, before allowing notice by publication, the court found that

the respondent's whereabouts could not be determined after reasonable efforts were made to locate her," this Court declared the proceedings void. *Id.* at 713.

The Court Rules reinforce the necessity of personal service. "In a child protective proceeding, a summons must be served on the respondent." MCR 3.920(B)(2)(b). The summons must not only identify the nature of the hearing, but also must "explain the right to an attorney and the right to trial by judge or jury[.]" MCR 3.920(B)(3)(b). MCR 3.921(B)(3) states that "[w]ritten notice of a hearing to determine if the parental rights to a child shall be terminated must be given to those appropriate persons or entities listed in subrule (B)(2)." Subrule (B)(2) includes "the parents of the child." MCR 3.921(B)(2)(c). And MCR 3.920(B)(4)(a) and (b) demand personal service unless the petitioner proves it "is impracticable or cannot be achieved." These rules serve "to ensure due process to a parent facing . . . termination of his parental rights." *In re Rood*, 483 Mich 73, 93; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.).

There is no record indication that personal service on respondent would have been impracticable or even difficult to achieve. The maternal grandmother, the DHS, and the court all knew where respondent resided. His Patricia Street address was listed on the affidavit of parentage and documents associated with the 2002 child protective proceeding as well as the 2011 petition. Indeed, respondent's address remained unchanged throughout AKB's lifetime. Despite that the referee initially ordered "all forms of service on father," no evidence supports that he was ever personally served with the petition or with notice of the termination hearing. "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). Service by publication clearly offended due process requirements, violated the relevant statute, and was inconsistent with our court rule requirements. Accordingly, we must consider the proceedings void.²

Respondent did not receive personal service of the petition or notice of the termination hearing. That defect casts an impenetrable shadow over the proceedings. The circuit court's constitutional error denied respondent due process of law and requires that the termination order be vacated.

² In a case challenging adoption proceedings governed by a notice statute other than MCL 712A.12, the Supreme Court rejected that service by mail sufficed to notify a parent of adoption proceedings: "Service by mail is not personal service as required by the statute . . . and jurisdiction of the circuit court does not depend on whether or not there is evidence that the mail was received, so long as the statute requiring personal service was not complied with." *In re Ives*, 314 Mich 690, 698; 23 NW2d 131 (1946), quoting *In re Wilkie's Estate*, 314 Mich 186, 195; 22 NW2d 265 (1946).

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

/s/ Elizabeth L. Gleicher

/s/ Michael J. Kelly

/s/ Mark T. Boonstra