STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
November 1, 2012

In the Matter of J.C. PAIGE, Minor.

No. 308980
Wayne Circuit Court
Family Division
LC No. 09-488610-NA

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

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating her parental rights to the minor child under MCL 712A.19b(3)(a)(*i*). We conclude that two errors in this case warrant reversal. First, respondent was not properly served with a summons and notice of the proceedings as required by Michigan law, rendering the proceedings void as to her rights. Second, the trial court failed to advise respondent at her first court appearance that she had the right to an attorney and that an attorney could be appointed for her if she could not afford one. Accordingly, we reverse and remand.

With respect to the first error, the Michigan Supreme Court has explained that the fundamental requirement of due process of law is the opportunity to be heard at a meaningful time and in a meaningful manner. *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009). "The opportunity to be heard includes the right to notice of that opportunity." *Id.* "In Michigan, procedures to ensure due process to a parent facing . . . termination of his [or her] parental rights are set forth by statute, court rule, DHS policies and procedures, and various federal laws . . . ." *Id.* at 93. Under statute and court rule, "a parent of a child who is the subject of a child protective proceeding is entitled to personal service of a summons and notice of proceedings." *In re SZ*, 262 Mich App 560, 564-565; 686 NW2d 520 (2004). More specifically, under MCL 712A.12, a noncustodial parent facing termination proceedings must be personally served with a summons. *In re Brown*, 149 Mich App 529, 541; 386 NW2d 577 (1986); see also *In re Atkins*, 237 Mich App 249, 250; 602 NW2d 594 (1999) (stating that MCL 712A.12 requires notice of a termination proceedings by personal service). MCL 712A.13 provides an exception to this personal-service requirement: "[I]f the judge is satisfied that it is impracticable to serve personally such summons or the notice provided for in the preceding section, he may order

service by registered mail addressed to their last known addresses, or by publication thereof, or both, as he may direct." Our court rules contain similar provisions. MCR 3.920(B)(2)(b) provides that a respondent in a child protective proceeding must be served with a summons.[1] And, MCR 3.920(B)(4)(a)-(b) provide that the service of the summons must be accomplished through personal service, with one exception:

> If 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 court may by ex parte order direct that it be served in any manner reasonably calculated to give notice of the proceedings and an opportunity to be heard, including publication.

While the court rule provides that the court's finding of impracticability must be on the basis of testimony or a motion and affidavit, this Court has held that a court can consider any evidence in the record when deciding if personal service is impracticable. *In re SZ*, 262 Mich App at 568-569.

"A failure to provide notice of hearing by personal service on a noncustodial parent in a termination proceeding, as required by statute, MCL 712A.12 [] is a jurisdictional defect…." *In re Adair*, 191 Mich App 710, 713-714; 478 NW2d 667 (1991); see also *In re Atkins*, 237 Mich App at 250-251. Statutes requiring service of notice to parents are strictly construed. *In re Atkins*, 237 Mich App at 251. Thus, even if personal service appears to be impracticable, Michigan law "still requires that the trial court first determine that personal service is impracticable" before substitute service can be accomplished. *In re Adair*, 191 Mich App at 714. Without proper service upon the parent, the court lacks personal jurisdiction over that parent, and any rulings regarding the rights of that parent are void. See *id.* at 715; see also *In re Terry*, 240 Mich App 14, 21 n 2; 610 NW2d 563 (2000).

In this case, the statute and court rules regarding service were completely disregarded. Service was attempted by mail and publication without any prior determination by the trial court that personal service was impracticable or could not be achieved. Specifically, the record contains a return of service from a summons sent to respondent on August 5, 2009. This summons was sent by regular mail to respondent's last known address on Fourth Street in Deming, New Mexico. An envelope dated September 7, 2009, reads "return to sender, [respondent] moved, left no address, unable to forward." Furthermore, notice of the September 2, 2009, hearing was published locally in Michigan, not even in New Mexico. At no time did the trial court determine that personal service was impracticable. The record does show that the caseworker had telephone contact with respondent before September 1, 2010, and that personal service was achieved on August 19, 2010, at an address on Country Club Road in Deming, New

---

[1] The summons must (1) direct the respondent to appear at a time and place specified by the court; (2) identify the nature of the hearing; (3) explain the rights to an attorney and trial; (4) notify the respondent of a child protective proceeding that the hearings could result in termination of parental rights; and (5) have a copy of the petition attached. MCL 3.920(B)(3).

Mexico. However, personal service was only achieved after the adjudicative trial and before the termination petition was filed, so service of process was not in compliance with the requirements of the court rules or statute. When respondent was personally served, she was not served timely with the relevant and necessary information to inform her of the nature of the proceedings.

Accordingly, Michigan law required that respondent be personally served with a summons; only if the trial court determined that such service was impracticable or could not be achieved could methods of substitute service be used. See *id.* at 713-714. The court made no such determination; therefore, respondent was not served in compliance with Michigan law. Accordingly, we must declare the trial-court proceedings with respect to respondent's rights void. See *id.*; *In re Atkins*, 237 Mich App at 250-251.

With respect to the second error, the constitutional guarantees of due process and equal protection extend the right to counsel to respondents in child protective proceedings. *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000). The right to counsel at termination proceedings is "a fundamental constitutional right." *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986), citing *Reist v Bay Circuit Judge*, 396 Mich 326; 241 NW2d 55 (1976). MCL 712A.17c(4) states that, in child protective proceedings,

> the court shall advise the respondent at the respondent's first court appearance of all of the following:
>
> (a) The right to an attorney at each stage of the proceeding.
>
> (b) The right to a court-appointed attorney if the respondent is financially unable to employ an attorney.
>
> (c) If the respondent is not represented by an attorney, the right to request and receive a court-appointed attorney at a later proceeding.

Furthermore, MCL 712A.17c(5) provides that, "[i]f it appears to the court . . . that the respondent wants an attorney and is financially unable to retain an attorney, the court shall appoint an attorney to represent the respondent." Similar to MCL 712A.17c, MCR 3.915(B)(1) provides as follows:

> (a) Advice and Right to Counsel. At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that
>
> (i) the respondent has the right to a court appointed attorney at any hearing conducted pursuant to these rules, including the preliminary hearing, if the respondent is financially unable to retain an attorney, and,
>
> (ii) if the respondent is not represented by an attorney, the respondent may request a court-appointed attorney at any later hearing.

> (b) Appointment of an Attorney. The court shall appoint an attorney to represent the respondent at any hearing, including the preliminary hearing, conducted pursuant to these rules if
>
> (i) the respondent requests appointment of an attorney, and
>
> (ii) it appears to the court, following an examination of the record, through written financial statements, or otherwise, that the respondent is financially unable to retain an attorney.

In this case, respondent's first court appearance was at the termination hearing on January 24, 2012. She appeared via speaker telephone and was not represented by an attorney. During the hearing, respondent inquired about whether she would have an attorney to represent her. The trial court informed her that she could not be assigned a court-appointed attorney because she had not been present for the previous court hearings. The trial court later reiterated that respondent could have asserted her rights when the child was first made a temporary court ward. The court stated that, because respondent had not been present for the last couple of years, she could not have an attorney represent her.

Respondent had a constitutional right to the assistance of counsel at the hearing in which her parental rights were terminated. See *In re Powers*, 244 Mich App at 121; *In re Trowbridge*, 155 Mich App at 786. MCL 712A.17c(4) and MCR 3.915(B)(1) required the trial court to advise respondent at her first court appearance at the termination hearing that she had a right to an attorney and that counsel would be appointed for her if she could not afford an attorney. The court erred when it failed to do so. As a non-lawyer, respondent may not have been aware that she had the right to legal representation at the proceedings. Moreover, because she was not properly notified of the proceedings, she could not have been reasonably expected to appear, assert her rights earlier, or even respond to the trial court's request for financial information so an attorney could have been appointed. Although a respondent in a child-protection proceeding may waive the right to counsel, MCL 712A.17c(6); MCR 3.915(B)(1)(c), there is no indication from the record that respondent's appearance without counsel was the result of respondent knowingly, intelligently, and voluntarily waiving her right to counsel after being properly advised of her rights. Respondent never indicated a desire to represent herself and forego the assistance of counsel. Rather, respondent's appearance without counsel was the result of the trial court's failure to properly advise her of her right to counsel. While "[a]n erroneous deprivation of appointed counsel for child protective proceedings can be subject to a harmless error analysis," we do not view the court's error as harmless but, rather, consider it to have affected the fundamental fairness of the proceeding, particularly when considered in conjunction with the failure to properly serve respondent. See *In re Williams*, 286 Mich App 253, 278; 779 NW2d 286 (2009); *In re AMB*, 248 Mich App 144, 235; 640 NW2d 262 (2001). Reversal is warranted.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Pat M. Donofrio
/s/ Jane M. Beckering