2013 IL App (1st) 121712-U

SECOND DIVISION
March 19, 2013

No. 1-12-1712

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE INTEREST OF ADAM P., a minor,	)	Appeal from
	)	the Circuit Court
(PEOPLE OF THE STATE OF ILLINOIS,	)	of Cook County
	)	
Petitioner-Appellee,	)	06 JA 812
	)	
v.	)	Honorable
	)	Maxwell Griffin Jr.,
ANTHONY M.,	)	Judge Presiding.
	)	
Respondent-Appellant.)	)	

JUSTICE CONNORS delivered the judgment of the court.
Justices Quinn and Simon concurred in the judgment.

O R D E R

***Held*:** Termination of respondent's parental rights must be reversed where default entry entered against respondent was improper when respondent's counsel was not notified of the termination hearing.

¶ 1 Respondent Anthony M., appeals from an order terminating his parental rights over the

minor, A.P. Respondent contends that his due process rights were violated when his attorney did not receive a copy of the supplemental petition for the appointment of a guardian with the right to consent to adoption, or notice of the hearing on the supplemental petition. When neither respondent nor his attorney appeared for a hearing on the supplemental petition, the trial court entered a default order against respondent. Respondent contends that the entry of the default order and subsequent termination of his parental rights deprived him of due process. Respondent argues in the alternative that the trial court's finding of unfitness was against the manifest weight of the evidence. For the following reasons, we reverse and remand.

¶ 2 I. BACKGROUND

¶ 3 A.P. was born on May 26, 2006, to Lisa Parker and respondent.[1] The State[2] filed a petition for adjudication of wardship on November 8, 2006, based on the allegations that A.P. was abused by nonaccidental infliction of physical injury and substantial risk of injury, and was neglected based on an environment injurious to his welfare. The petition further alleged that on or about October 25, 2006, A.P. was brought to Children's Memorial Hospital and was diagnosed with both old and new bilateral chronic and acute subdural hematomas as well as multiple and extensive bilateral retinal hemorrhages. Medical personnel stated that A.P.'s injuries were the result of abusive head trauma, and that the mother and father's explanations were inconsistent

[1]Lisa Parker is deceased and is not a party to this appeal.

[2]The minor's guardian *ad litem* is also a petitioner in this appeal, however its argument is substantially the same as the State's and thus we will only refer to the State's argument in this order, unless they differ.

with the type of injury sustained. Medical personnel indicated that respondent admitted to shaking the child and was in jail in connection with the incident. On March 30, 2007, respondent pled guilty to the criminal charge of aggravated domestic battery and was sentenced to two years of probation and 180 days in the Cook County Department of Corrections. A.P. was placed under the temporary custody of the Illinois Department of Children and Family Services (DCFS).

¶ 4 On July 10, 2007, the juvenile court adjudged A.P. a ward of the court and found respondent unable to care for him. A.P. was placed under DCFS guardianship.

¶ 5 On September 24, 2007, the first permanency planning hearing for A.P. was held. Respondent was not present, but had called his caseworker to say he was running late. The juvenile court selected a goal of return home pending status.

¶ 6 On March 11, 2008, another permanency hearing took place. The juvenile court designated return home within 12 months as the permanency goal for A.P. The court found that respondent had made substantial progress towards A.P.'s return home, and that he was actively participating in services.

¶ 7 A third permanency hearing was held on August 27, 2008. Respondent was present. The juvenile court against stated the goal of return home within 12 months and stated that respondent was in services but had not made substantial progress towards A.P.'s return home.

¶ 8 On April 23, 2009, the next permanency hearing was held. Respondent was present. The juvenile court found that respondent was unable to care for A.P., and determined that the goal was substitute care pending court determination of termination of parental rights.

¶ 9 The September 29, 2009, permanency order stated substitute care pending court determination on termination of parental rights. The juvenile court found that A.P. was in an appropriate preadoptive placement but that the termination trial was yet to be commenced.

¶ 10 On March 31, 2010, attorney Joseph Dinatale filed an appearance on behalf of respondent, and the juvenile court entered an order vacating the appointment of respondent's previous attorney.

¶ 11 On April 14, 2010, the juvenile court entered an order assigning the case to mediation to address the permanency and relationship issues. A mediation report was filed on June 7, 2010, which indicates that the parties reached a partial agreement. The foster parents and respondent agreed on certain parameters for respondent's visitation.

¶ 12 On June 24, 2010, respondent signed a "Final and Irrevocable Consent to Adoption," agreeing to A.P.'s adoption. The document and accompanying checklist of understanding for consent to adoption by a specific person indicated that respondent's consent to adoption was only valid if the petition to adopt was filed within one year. On that same date of June 24, 2010, the juvenile court entered an order stating that all unfitness allegations as to respondent were withdrawn without prejudice.

¶ 13 On August 13, 2010, the juvenile court entered a termination hearing order which stated that respondent waived notice and voluntarily consented to A.P.'s adoption by Kathy C. (the foster parent). The order stated that parental rights were terminated, and it appointed a guardian with the right to consent to A.P.'s adoption. The permanency order from August 13, 2010, stated the goal of adoption, explaining that the father signed consents for A.P. to be adopted by the

current foster parent.

¶ 14 Subsequent permanency orders, dated February 15, 2011, and August 10, 2011, reflect a continued goal of adoption. An October 2011 DCFS service plan stated that A.P. was not adopted within a year because the death certificate for his natural mother had not been entered by the morgue.

¶ 15 On August 19, 2011, respondent filed a *pro se* motion to revoke his specific consent to adoption by Kathy C., and to vacate the order terminating his parental rights. The motion stated that to date, no petition to adopt the minor had been filed, and that under the Adoption Act, where no petition has been filed within a year of signing the specific consent, the consent can be voided or revoked. The motion was signed by respondent, who listed his address as 3636 N. Oakdale in Chicago.

¶ 16 On September 8, 2011, the juvenile court entered orders granting respondent's *pro se* motion for revocation of consent, voiding the consent signed by respondent, and vacating the termination of respondent's parental rights.

¶ 17 On January 30, 2012, the State filed a supplemental petition for the appointment of a guardian with the right to consent to adoption, pursuant to section 2-29 of the Act. 705 ILCS 405/2-29 (West 2010). The petition alleged that A.P.'s mother was deceased and that respondent had failed to make reasonable efforts or progress and was unable to discharge parental responsibilities because of mental impairment, illness, or retardation. See 750 ILCS 50/1 D(m),(p) (West 2010). The State contended that it was in the best interest of the minor that a guardian be appointed with the right to consent to his adoption. The State requested the court to

find respondent unfit and to terminate his parental rights.

¶ 18 A summons to appear and answer the petition on February 27, 2012, was sent to respondent at 3636 N. Oakdale in Chicago. An affidavit of service reflects that on February 12, 2012, respondent was not served because there was no such address.

¶ 19 On February 27, 2012, the permanency order stated the goal of substitute care pending court determination of parental rights. Respondent was not present.

¶ 20 On February 29, 2012, summons was reissued to the respondent to 3636 W. Oakdale in Chicago, directing him to appear and answer on April 5, 2012. An affidavit of service indicates that respondent was served by substitute service on March 24, 2012, by leaving a copy with Zsa Zsa M., a 39-year-old female, at 3636 W. Oakdale. On April 5, 2012, respondent did not appear or answer, and the juvenile court entered an order defaulting respondent for want of appearance/answer. The juvenile court entered an order continuing the case to May 10, 2012.

¶ 21 On May 10, 2012, the case was up in the juvenile court for a termination of parental rights prove-up. Respondent was not present, nor was counsel there to represent respondent's parental rights in the termination hearing. After the termination hearing, the juvenile court entered an order finding that respondent was unfit on three grounds. The juvenile court also found it was in A.P.'s best interests to terminate respondent's parental rights and to appoint a guardian with the right to consent to adoption. The termination order notes that respondent was not present in court and that he had been defaulted through substitute service that was effected March 24, 2012, with the default entered on April 5, 2012. A new permanency goal for adoption was entered. Respondent filed his notice of appeal on June 8, 2012.

¶ 22 II. ANALYSIS

¶ 23 On appeal, respondent first contends that he was deprived of procedural due process when he was defaulted for not answering the State's supplemental petition for the appointment of a guardian with the right to consent to adoption, and for not appearing on the April 5, 2012, court date. Respondent was issued a summons by substitute service on March 24, 2012, informing him of the supplemental petition for the appointment of a guardian with the right to consent to adoption. Respondent contends that substitute service was not adequate because the State was required to serve his attorney. The State responds that substitute service was adequate because there was no attorney of record for respondent.

¶ 24 Section 2-15(3) of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/2-15 (West 2010)), states that when a petition is filed, the clerk of the court shall issue a summons with a copy of the petition attached. The summons shall be directed to each person named as a respondent in the petition. 705 ILCS 405/2-15(1) (West 2010). The summons must contain a statement that the respondent is entitled to have an attorney present at the hearing on the petition. 705 ILCS 405/2-15(2) (West 2010). The summons shall contain a notice that the parties will not be entitled to further written notices or publication notices of proceedings in the case, including the filing of an amended petition or a motion to terminate parental rights, except as required by Supreme Court Rule 11 (eff. Jan. 1, 2013). 705 ILCS 405/2-15 (West 2010). Supreme Court Rule 11 addresses the "Manner of Serving Papers Other than Process and Complaint on Parties Not in Default in the Trial and Reviewing Courts." Paragraph (a) of Rule 11 identifies on whom service must be made (a party's attorney of record, otherwise, the party); paragraph (b) identifies

methods of service, which includes, if a party is not represented by counsel, leaving the documents at the party's residence with a family member of the age of 13 years or upwards.

¶ 25 Both parties concede that Supreme Court Rule 11 governs in this case, since the supplemental petition for the appointment of a guardian with the right to consent to adoption was a paper other than process or the complaint, respondent was not in default, and respondent had appeared many times in the case prior to the filing of this petition. *In re Haley D.*, 2011 IL 110886, ¶ 79 (2011) ("[S]ection 2-15(3) must be read to require the State to serve respondents who have appeared and are not in default on the adjudicatory petition with notice of subsequent proceeding and filings, in the manner set forth in Rule 11.")

¶ 26 "The plain language of section 2-15(3) of the Juvenile Court Act (705 ILCS 405/2-15(2) (West 2008)) unambiguously requires that Supreme Court Rule 11 be followed. It is well settled that courts cannot depart from the plain language of a statute by reading into it exceptions, limitation, or conditions not expressed by the legislature." *In re Haley D.*, 2011 IL 110886, ¶ 73. "Rule 11 lays out on whom service shall be made and the acceptable methods of service, depending on whether a party is represented by counsel or not." *In re Haley D.*, 403 Ill. App. 3d 370, 375 (2010). Rule 11 specifically states that "[i]f a party is represented by an attorney of record, service shall be made upon the attorney. Otherwise service shall be made upon the party." *Id.* "Supreme court rules are not suggestions; they have the force of law , and the presumption must be that they will be obeyed and enforced as written." *Id.*

¶ 27 The State does not take issue with the requirements of Rule 11, but rather argues that there was no attorney of record for respondent, and thus substitute service on respondent was

proper. Respondent maintains that there is no indication from the record that his attorney, Mr. Dinatale, ever withdrew as respondent's attorney in this case.

¶ 28 Illinois Supreme Court Rule 13 (eff. Jan. 4, 2013), states that an attorney may not withdraw his appearance for a party without leave of court and notice to all parties of court. After careful review of the record, we can find no indication that respondent's attorney withdrew as counsel. Nevertheless, the State argues that respondent's filing of a *pro se* motion was indicative that he was not represented by counsel, or alternatively, that respondent's attorney's representation ended at the time respondent's parental rights were terminated. However, the State fails to cite to any authority supporting either proposition. *Elder v. Bryant*, 324 Ill. App. 3d 526, 533 (2001) (mere contentions, without citation of authority, do not merit considering on appeal).

¶ 29 Rule 11 was not complied with in this case because respondent's attorney was not served with notice of the supplemental petition or notice of the hearing on the supplemental petition. See *In re M.G.*, 301 Ill. App. 3d 401 (1998) (service on the respondent's attorney, and not respondent, was proper where Rule 11 provides that if a party is represented by an attorney of record, service shall be made upon the attorney); see also *Public Taxi Service, Inc. v. Ayrton*, 15 Ill. App. 3d 706, 711 (1973) ("If an attorney has appeared for [a party], service shall be made upon the attorney.")

¶ 30 The failure to give notice of the supplemental petition to respondent's attorney is troubling to us because of the nature of parental termination cases. The interests of parents in the care, custody, and control of their children is one of the oldest of the fundamental liberty interests recognized, and this interest is protected by the due process clause of the fourteenth amendment.

In re K.S., 365 Ill. App. 3d 566, 577 (2006); U.S. Const., amend. XIV. " 'When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. *** Few forms of State action are both so severe and so irreversible.' " *In re Vanessa C.*, 316 Ill. App. 3d 475, 481 (2000) (quoting *Santosky v. Kramer*, 455 U.S. 745, 759 (1982)). In recognition of the significant interest in jeopardy in termination of parental rights cases, the Supreme Court has held that state intervention to terminate the relationship between a parent and a child must be accomplished by procedures meeting the requisites of the due process clause. *In re Vanessa C.*, 316 Ill. App. 3d at 481 (citing *Santosky*, 455 U.S. at 759).

¶ 31 Due to the significant liberty interests in jeopardy in termination of parental rights cases, inadequate notice in a parental termination case implicates procedural due process issues. See *Haley D.*, 2011 IL 110886 at ¶ 70; *In re Haley D.*, 403 Ill. App. 3d 370, 376 (2010), *affirmed on other grounds by In re Haley D.*, 2011 IL 0886 (2011) (lack of notice of parental termination proceeding violated right to due process where the interest of parents in the care, custody, and control of their children is one of the oldest and fundamental liberty interests protected by due process). While we are aware that a respondent has a duty to follow his own case and that a parent's statutory right (705 ILCS 405/1-5 (West 2010)) to be present at a hearing to terminate parental rights is not absolute, this court has recognized that the natural parent must be afforded the opportunity to participate in the proceeding in a meaningful manner in order to comport with due process requirements. See *In re C.J.*, 272 Ill. App. 3d 461 (1995) (it was a violation of respondent's due process rights to hold parental termination hearing without her presence in court due to incarceration, even though she was represented by attorney, where court could have given

respondent a better opportunity to be heard); *In re Vanessa C.*, 316 Ill. App. 3d at 484 (respondent's due process rights were violated by the court's sanction barring her from presenting a defense where there were less severe alternatives available and respondent's liberty interests in her children were at risk of erroneous deprivation if the court failed to hear evidence in support of respondent's desire to reunite with her family); *In re D.R. and D.M.R.*, 307 Ill. App. 3d 478 (1999) (respondent's due process rights were violated when trial court sanctioned respondent for her failure to appear by denying respondent's counsel the opportunity to present or cross-examine witnesses).

¶ 32 Additionally, we have concerns about the procedures followed after the entry of the default order. "A default order is not the same as a default judgment." *Haley D.*, 2011 IL 110886, ¶ 64 (2011). When the April 5, 2012 finding of default was entered, the State and the court both contemplated that a "prove up" would still be necessary. "Where that occurs, the entry of default is considered a nonfinal order for purposes of section 2-1301" of the Code of Civil Procedure. 735 ILCS 5/2-1301 (West 2010). Section 2-1302 of the Code states that upon entry of an order of default, the attorney for the moving party shall immediately give notice thereof to each party who has appeared, against whom the order was entered, or such party's attorney of record. 735 ILCS 5/2-1302 (West 2010). The Code specifically "requires that the defendant be notified of the default order." *American Service Insurance Co. v. City of Chicago*, 404 Ill. App. 3d 769, 779 (2010). The record does not contain any such notice of the default entry to either respondent or respondent's attorney. While we are aware that "the failure of the attorney to give the notice does not impair the force, validity, or effect of the order," we nonetheless maintain that

inadequate notice, and respondent's subsequent nonappearance at the prove-up, implicates procedural due process issues in a termination case. *Id*.

¶ 33 Due to the notice inadequacies of both the supplemental petition and the default order, we find that the judgment terminating respondent's parental rights based on the default order must be vacated and that the cause should be remanded to the circuit court for further proceedings and with adequate notice to respondent and his attorney. We emphasize, however, that we make no findings as to respondent's fitness as a parent, or the best interests of A.P., as those issues can only be reached after respondent has had reasonable notice and a reasonable opportunity to participate in the proceedings. The judgment of the circuit court of Cook County is reversed and remanded for further proceedings.

¶ 34 Reversed and remanded with directions.