

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of CHRISTOPHER HAROLD  
SCHWINNE, Minor.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MARY HOLLISTER, a/k/a MARY SCHWINNE,

Respondent-Appellant,

and

MORRIS GRAY, a/k/a MORRIS GREY,

Respondent.

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UNPUBLISHED

March 10, 2000

No. 217473

Wayne Circuit Court

Family Division

LC No. 97-359574

Before: Zahra, P.J., and Saad and Gage, JJ.

PER CURIAM.

Respondent-appellant appeals as of right from the family court order terminating her parental rights to the minor child under MCL 712A.19b(3)(a)(ii), (c)(i), (g) and (j); MSA 27.3178(598.19b)(3)(a)(ii), (c)(i), (g) and (j). We reverse and remand.

Respondent-appellant first contends that the family court erred in discharging her counsel prior to the permanent custody hearing. MCR 5.915(B)(1) mandates the appointment of counsel for indigent parents at all hearings in a child protective proceeding. See *In re Osborne*, 230 Mich App 712, 716; 584 NW2d 649 (1998), vacated on other grounds 459 Mich 360; 589 NW2d 763 (1999). The court rule requires affirmative action by respondent-appellant, however, to trigger the appointment and continuation of appointed counsel in all hearings that may affect her parental rights, and the right to

counsel may be waived or relinquished under MCR 5.915(B)(1)(c). *In re Hall*, 188 Mich App 217, 222; 469 NW2d 56 (1991).

With respect to respondent-appellant's claim that the family court failed to make a detailed inquiry regarding her contact with counsel, the record indicates that counsel advised the family court at the first preliminary hearing on the permanent custody petition that she believed respondent-appellant still lived in Texas, but that counsel did not have respondent-appellant's address. In discharging counsel two weeks later at the continued preliminary hearing, the referee noted that respondent-appellant had missed several prior hearings, and that respondent-appellant's trial counsel had also been discharged earlier in the proceedings. Contrary to respondent-appellant's suggestion, her whereabouts were unknown for some time prior to the preliminary hearing until mid to late October 1998. Respondent-Appellant informed the foster care caseworker prior to the first pretrial hearing that she was moving to Ohio and would call with her new address. When her address in Ohio became known, notice was sent by certified mail to respondent. Although the record does not contain the certified mail receipt, the family court noted at the October 28, 1998 continued preliminary hearing that it possessed a receipt verifying respondent-appellant's receipt of notice at an Ohio address.

While respondent-appellant claims that she could not attend court hearings because she was dealing with criminal charges (felony child endangerment) in Texas, the lower court file contains a February 10, 1998 letter from respondent-appellant's Texas attorney stating that respondent-appellant would not violate the conditions of her bond if she traveled to Michigan to attend court hearings. We conclude that like the respondent in *Hall, supra*, respondent-appellant effectively terminated the attorney-client relationship, thereby waiving or relinquishing her right to counsel under MCR 5.915(B)(1)(c). Therefore, the family court did not err in discharging counsel prior to the permanent custody hearing.

Respondent-appellant also argues that she did not receive adequate and proper notice of the permanent custody proceedings. A failure to provide notice of a hearing to a noncustodial parent in a termination proceeding as required by statute, MCL 712A.19b(2); MSA 27.3178(598.19b(2)), is a jurisdictional defect that renders all proceedings in the family court void. *In re Adair*, 191 Mich App 710, 713-714; 478 NW2d 667 (1991), citing *In re Brown*, 149 Mich App 529, 534-542; 386 NW2d 577 (1986).<sup>1</sup>

In this case, service was accomplished by both publication and certified mail. MCL 712A.13; MSA 27.3178(598.13) explains that personal service of a summons may be excused in favor of service by publication or registered mail when personal service is impracticable. We reject respondent-appellant's claim that notice by publication was improper on the basis that the family court failed to find that her whereabouts could not be determined after reasonable efforts were made to locate her. Respondent-appellant's counsel advised the family court at the pretrial hearing on October 14, 1998, that she believed respondent-appellant still lived in Texas, but she did not have respondent-appellant's address. The foster care caseworker testified that she talked with respondent-appellant two days before the hearing, at which time respondent-appellant informed the caseworker that she was moving to Ohio and would call with her address. The referee noted that respondent-appellant had lived in Michigan, Texas and Louisiana since the proceedings began, then authorized notice by publication and

continued the pretrial hearing. Because respondent-appellant had lived in several different places since the child came into petitioner's care and her whereabouts were unknown at the time of the hearing, the referee did not err in authorizing notice by publication.

Nevertheless, a review of the record reveals that respondent-appellant was not provided timely notice of the permanent custody proceedings. MCL 712A.19b(2)(c); MSA 27.3178(598.19b(2)(c)) demands "[n]ot less than 14 days before a hearing to determine if the parental rights to a child should be terminated, written notice of the hearing shall be served" on the child's parents. Here, the published notice appeared only seven days before the continued pretrial hearing on October 28, 1998, and only eight days before the October 29, 1998 permanent custody hearing. Therefore, this notice by publication was untimely under subsection 19b(2). A summons was also sent by certified mail to respondent-appellant in Ohio on or about October 15, 1998, thirteen days before the continued pretrial hearing on October 28, 1998, and fourteen days before the October 29, 1998 permanent custody hearing. Although, as mentioned previously, no returned verification of respondent-appellant's receipt of the certified letter mailed to Ohio exists within the record provided this Court, it appears impossible that the certified letter mailed to Ohio only fourteen days preceding the termination hearing likewise arrived in Ohio that very same day. We note that statutes requiring notice to parents must be strictly construed. *In re Atkins*, 237 Mich App 249, 251; 602 NW2d 594 (1999). Because subsection 19b(2)'s service of notice requirement was not satisfied, we conclude that the family court lacked jurisdiction to enter the termination order, and that consequently this order must be declared void. *Adair, supra* at 714-715; *Brown, supra* at 534-542.

Appellee incorrectly argues that any error in service was harmless because respondent-appellant had actual notice of the termination proceedings. The foster care caseworker testified at the permanent custody hearing that she had discussed the permanent custody petition with respondent-appellant when they spoke before the pretrial hearing on October 14, 1998, and that respondent-appellant was aware of the hearing, but was unsure whether she would attend because she was moving at the time. This Court has held, however, that a lack of service is not cured even though the noncustodial parent is represented by counsel at the hearing and has received actual notice of the time and place of the hearing. *In re Mayfield*, 198 Mich App 226, 231; 497 NW2d 578 (1993); *Brown, supra* at 541-542.

We also reject appellee's argument that MCR 5.920(F) applies to excuse service of the summons for the termination hearing. At the adjudication hearing in this case, a dispositional order was entered placing the child in the temporary custody of the family court. Therefore, under MCL 712A.20; MSA 27.3178(598.20), the family court could not subsequently proceed to termination without issuance and service of a fresh summons. *Atkins, supra*. "MCR 5.920(F) does not apply to excuse initial service of a summons for a termination hearing, but, instead, only excuses subsequent, repetitive service after an initial summons for a termination hearing has been properly served and the proceedings are subsequently adjourned to a future date." *Id.*

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

/s/ Brian K. Zahra  
/s/ Henry William Saad  
/s/ Hilda R. Gage

<sup>1</sup> MCR 5.920 also governs service of process in juvenile court proceedings. A failure to follow the court rules' notice requirements does not, however, establish a jurisdictional defect. *Adair, supra* at 714.