

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of CAMERON BLAIR SWARTZ,
Minor.

MINDY SWARTZ,

Petitioner-Appellee,

V

CYNTHIA ANN BENJAMIN,

Respondent-Appellant.

UNPUBLISHED

August 23, 2005

No. 260032

Oakland Circuit Court

Family Division

LC No. 2003-687023-NA

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Respondent, the child's biological mother, appeals by right from the trial court's order terminating her parental rights pursuant to MCL 712A.19b(3)(a)(ii), (f), (g), and (j). We reverse and remand to the trial court for further proceedings.

The child lived with her biological father, Douglas H. Swartz, and petitioner, his wife, from her birth in 1995. In 2002, Mr. Swartz was awarded sole physical and legal custody over the child. In 2003, Mr. Swartz died, and petitioner filed a petition for termination of respondent's parental rights over the child. Neither respondent nor her counsel were present at the November 16, 2004, termination trial. The court accepted evidence from petitioner and concluded that the evidence supported termination of respondent's parental rights.

On appeal, respondent argues that she was denied due process because neither she nor her counsel was provided with notice of the termination hearing. We need not reach the constitutional issue because the record in this case fails to establish respondent was personally served with a summons and a copy of the termination petition as required by statute and court rule. "A failure to provide notice of a termination proceeding hearing by personal service as required by statute, MCL 712A.12; MSA 27.3178(598.12), is a jurisdictional defect that renders all proceedings in the trial court void." *In re Atkins*, 237 Mich App 249, 250-251; 602 NW2d 594 (1999), citing *In re Adair*, 191 Mich App 710, 713-714; 478 NW2d 667 (1991) and *In re Brown*, 149 Mich App 529, 534-542; 386 NW2d 577 (1986).

Petitioner argues evidence that a scheduling order setting the termination trial date was mailed to respondent's "attorney of record" provided respondent adequate notice.¹ We disagree.

In general, both MCL 712A.12 and MCR 3.920(B)(4)(a) require the summons regarding a petition to terminate parental rights be personally served on a non-custodial parent, unless the parent waives service in writing, MCL 712A.12; MCR 3.920(E), or the trial court finds that it is "impracticable to serve personally such summons or the notice," MCL 712A.13, or "that personal service of the summons is impracticable or cannot be achieved," MCR 3.920(B)(4)(b).

In this case, the record shows that respondent was not personally served with a summons and copy of the petition to terminate her parental rights. The verified petition to terminate parental rights was filed on November 26, 2003. Thereafter, a deputy sheriff filed two certificates of non-service on respondent. The purported service by mail of the termination trial date on respondent's "attorney of record" was ineffective to cure this jurisdictional defect. "[R]eceipt of the amended petition [to terminate parental rights] by respondent's attorney cannot be deemed a proper substitute for personal service on respondent." *Atkins, supra* at 251. "MCR 5.920(F) [now MCR 3.920(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." *Atkins, supra* at 251.

Respondent was not personally served with a summons and copy of the petition to terminate her parental rights, nor did she waive service of process in writing, MCL 712A.12; MCR 3.920(E). Further, the trial court did not find that it was "impracticable to serve personally such summons or the notice," MCL 712A.13, or that personal service "cannot be achieved," MCR 3.920(B)(4)(b). Consequently, the trial court lacked jurisdiction to terminate respondent's parental rights. *In re Atkins, supra* at 250-251.

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

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

¹ Petitioner asserts respondent's "attorney of record" was her brother, Scott Smith, who entered his appearance at the preliminary hearing. But attorney Richard Siriani substituted for Smith. The trial court subsequently permitted Siriani to withdraw. Smith did not enter a new appearance, but he personally appeared for respondent at a pretrial conference, and his name was signed with permission on two subsequent stipulations to adjourn. Further, the paralegal who mailed Smith notice of the trial date averred that Smith told her that respondent intended to retain Art Weiss to represent her at the termination trial, and that retention of Weiss was pending "financial arrangements."