

STATE OF MICHIGAN
COURT OF APPEALS

In re JENNIFER NAKONECZNY, Minor.

UNPUBLISHED
July 11, 1997

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CHRISTINE NAKONECZNY,

Respondent-Appellant,

and

LEROY NAKONECZNY,

Respondent.

No. 197106
Presque Isle Probate
LC No. 95-000015-NA

In re LYNN MARIE NAKONECZNY, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CHRISTINE NAKONECZNY,

Respondent-Appellant,

and

No. 197125
Presque Isle Probate
LC No. 95-000021-NA

LEROY NAKONECZNY,

Respondent.

Before: Corrigan, C.J., and Michael J. Kelly and Hoekstra, JJ.

PER CURIAM.

Respondent appeals by right the probate court's order terminating her parental rights to her minor children, Jennifer and Lynn Nakoneczny, under MCL 712A.19b(3)(b)(ii) and (h), MSA 27.3178(598.19b)(3)(b)(ii) (failure to prevent abuse) and MCL 712A.19b(3)(h); MSA 27.3178(598.19b)(3)(h) (imprisonment). We affirm.

The probate court did not clearly err in finding that the statutory grounds for termination had been established by clear and convincing evidence. MCR 5.974(I); *In re Ryan Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Further, respondent-appellant failed to show that termination of her parental rights was clearly not in the children's best interests. *In re Hall-Smith*, 222 Mich App 470, 472; ____ NW2d ____ (1997). Thus, the probate court did not err in terminating respondent-appellant's parental rights to the children. MCL 712A.19b(5); MSA 27.3178(598.19b)(5).

The record reveals that respondent was aware that her husband sexually abused their older daughter, Jennifer, but did nothing to prevent the continued abuse. The record also reveals that respondent's younger daughter, Lynn, witnessed certain incidents of this abuse. Further, the probate court placed great weight on respondent's cohabitation and ongoing relationship with another man who previously had been convicted of sexually abusing a child. This living arrangement, begun after respondent's husband was imprisoned, violated respondent's probation and led to her current incarceration. Despite this, respondent has expressed her intention to marry her new boyfriend upon her release from prison.

In addition, respondent failed to take responsibility for the safety of her daughters. She did not follow through with substance abuse and parenting skills counseling sessions. She has continued to blame Jennifer for her father's conviction for child abuse and for the family's dissolution.

The probate court did not clearly err in finding that respondent's children would be deprived of a normal home for a period exceeding two years and that there is no reasonable expectation that respondent will be able to provide proper care and custody within a reasonable time considering the age of the children. Once a statutory ground for termination of parental rights has been established, the probate court shall order termination unless that termination is clearly not in the best interests of the child. *In re Hall-Smith, supra*. The burden of proof regarding the best interests of the child rests with the respondent. *Id.* The probate court in this case properly exercised its discretion in deciding that termination of the respondent's parental rights to Jennifer and Lynn was in the best interests of the children. The evidence clearly supports the probate court's determination that the grounds for

termination were supported by clear and convincing evidence. Further, respondent has failed to offer evidence that termination was not in the children's best interests. Indeed, the probate court's decision regarding the best interests of the children is supported by the evidence establishing the grounds for termination.

Respondent next argues that, as a non-Indian and as a parent of non-Indian children, she was denied equal protection under US Const, Am V and Const 1963, art 1, § 2, because the petitioner need only satisfy a clear and convincing evidentiary standard to terminate her parental rights, while it applies a reasonable doubt standard to American Indians and their children. We reject petitioner's contention.

This issue was not raised in the probate court. *People v Grant*, 445 Mich 535, 537; 520 NW2d 123 (1994), holds that "appellate courts will consider claims of constitutional error for the first time on appeal when the alleged error could have been decisive of the outcome." The alleged constitutional error was not outcome determinative, because the proofs sufficed under the higher evidentiary standard. This Court previously addressed the merits of this issue in *In re Julie Miller*, 182 Mich App 70; 451 NW2d 576 (1990). There, this Court applied the rational relationship test for constitutionality of laws relating to Indians as set forth in *Morton v. Mancari*, 417 US 535; 94 S Ct 2474; 41 L Ed 2d 290 (1974). The United States Supreme Court ruled in *Mancari* that preferences given to American Indians "as members of quasi-sovereign tribal entities," and not as a "discrete racial group," are not "proscribed forms of racial discrimination." *Mancari, supra*, 94 S Ct at 2484-85. As such, the rational basis test is applied to such preferences. *Id.* This Court, in *In re Miller*, concluded that the evidentiary standard applied to American Indians "is a permissible goal rationally tied to the fulfillment of Congress' unique guardianship obligation toward Indians ... and [is not a] denial of ... equal protection." *Miller, supra* at 76.

Affirmed.

/s/ Maura D. Corrigan
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra