STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of RICHARD W. BRUKARDT, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JANET GEIGER,

Respondent-Appellant,

and

ADAM BRUKARDT,

Respondent.

UNPUBLISHED
July 31, 1998

No. 205944
Menominee Juvenile Court
LC No. 94-004535 NA

Before: Markman, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Respondent Janet Geiger ("respondent") appeals as of right the termination of her parental rights to her minor son pursuant to MCL 712A.19b(3)(c)(i) and (c)(ii); MSA 27.3178(598.19b)(3)(c)(i) and (c)(ii). We affirm.

Respondent's son, Richard, was born February 5, 1993. On November 5, 1993, a protective services worker, Kathi Hupy, received a referral regarding respondent and Richard's father, Adam Brukardt. It appears that the major problem was Adam Brukardt's abuse of both respondent and their son, Richard. After two visits to the home by Hupy, respondent and Brukardt went to Hupy's office on November 17, 1993 to state their displeasure regarding her involvement in their lives. Hupy wrote in her report that she was threatened by respondent and Brukardt, and subsequently obtained an order

from the probate court to take Richard into custody. There is no evidence that jurisdiction was ever established prior to the issuance of this order, nor was any petition filed with the court.

However, Richard was taken into the custody of petitioner[1] and a "detention review" hearing was held on December 1, 1993. Without addressing the issue of jurisdiction, the probate court ordered respondent and Brukardt to follow the conditions of a Service Agreement to be prepared by the agency. The court also indicated "that no petition will be filed as long as all conditions in the Service Agreement are followed." Once respondent and Brukardt agreed to these terms, Richard was returned to their care.

On April 21, 1994, another order to take Richard into temporary custody was entered by the court. Finally, on April 22, 1994, a petition was filed by petitioner Family Independence Agency seeking temporary custody of Richard. An amended petition was filed on April 27, 1994. On August 24, 1994, respondent and Brukardt pleaded no contest to the petition, although respondent pleaded to only the first four of the thirteen allegations in the amended petition, as follows:

> 1. That Kathi Hupy of Menominee County Dept. of Social Services advised their office has been investigating complaints regarding abuse or neglect in the Brukardt/Geiger residence . . . involving Richard Brukardt since 11/5/93,
>
> 2. That Richard Brukardt, DOB 2/25/93, is the son of Adam Brukardt, DOB 6/2/71, and Janet Geiger, DOB 11/12/73, and is presently in their care and custody,
>
> 3. That on 11/11/93 Janet Geiger and Adam Brukardt signed a Service Agreement with Menominee County Dept. of Social Services and have failed to comply,
>
> 4. That Sherri Hillbrand advises that Janet Geiger and Adam Brukardt have not consistently participated with Neighborhood Family Centers parenting classes.

The majority of the remainder of the petition alleged physical and emotional abuse of Richard by his father, Adam Brukardt. However, the petition also alleged that respondent and Brukardt did not comply "with the recommendations of Menominee Alcohol and Other Drugs Center," and that they had been observed smoking marijuana while Richard was present. After several review hearings, the agency filed a petition seeking termination on June 6, 1995. Brukardt pleaded no contest to the termination petition at this time.

From June 1995 until December 1996, there were several adjournments and delays. Respondent gave birth to a daughter, Jessica, during this time and began living with her new boyfriend and his three children in May 1996. The court found that once the agency "decided to seek termination, it ceased all efforts to rehabilitate the mother or reunite the family. Thus, the Petitioner had no evidence of the mother's activities after June 1995." During this time, the only service provided to

respondent was supervised visitation with Richard; no other efforts were made to rehabilitate her or to reunite the family. Respondent's compliance with the visitation schedule was apparently far from exemplary: She did not show up on a great many occasions and failed to visit Richard at all for several weeks in late 1996. She was also characterized as failing to make Richard the "focus of her attention" during visitation, instead concentrating her attention on Jessica. However, there were apparently no other inappropriate parenting skills demonstrated by respondent. In December 1994, a caseworker smelled liquor on respondent, and she tested positive for marijuana use in April 1994 and December 1996. At the December 1996 hearing, the court ordered the agency "to provide maximum assistance to Ms. Geiger in meeting the Court's expectations."

After this order, caseworker Mary Lou Nast developed a service plan and respondent signed it, yet Nast still did not discuss planning for Richard's future. Nast explained that no such discussions took place because the termination petition had been filed and termination was the goal. Visitation was scheduled for three times per week, and respondent's compliance improved dramatically. She missed only three visits from December 1996 until the termination hearing in June 1997. However, the quality of the visitations was still characterized as "poor." According to testimony, respondent would often focus primarily on Jessica instead of Richard. Sometimes, she would fall asleep for portions of the visits when Jessica was nursing. She often would not acknowledge or greet Richard at the beginning of the visit and would not hug him at the end. Richard did not like to use the bathroom with respondent present. Richard seemed quiet, would not talk very much around respondent and would often play alone. However, he seemed to "perk up" at the end of visits and would run to his foster mother.

In accordance with the service plan, respondent had a substance abuse evaluation on December 30, 1996, and was diagnosed as alcohol dependent. Although Nast testified that respondent had not completed individual substance abuse counseling, this conflicted with the testimony of the substance abuse counselor. The counselor said that while respondent's prior effort at therapy was not marked by good attendance, she felt that respondent had completed all of the treatment recommendations for group and individual counseling during this attempt to overcome her alcohol problem and characterized the amount of time required by respondent to complete the program as "reasonable." She recommended that respondent attend Alcoholics Anonymous or a community support system if she felt the need. There was no further evidence of either alcohol or drug use after December 1996.

Nast testified that respondent failed to attend and complete required parenting classes. She took the parenting class for credit towards her GED and was required to be there for thirty-four class periods. During the 1994 to 1995 school year, respondent attended twenty-three classes. During the 1995 to 1996 school year, respondent attended the first day of class for the entire period, but on the next three classes, she left at the break. She did not return that school year. Although she did make-up work on two occasions, respondent did not receive credit for either school year.

Respondent acknowledged some of her problems to the court, but overall she responded to the evidence with excuses. With regard to visitation, respondent explained that the agency did not provide her with transportation and she attended visitation when she could. She stated that they did not have enough time at the visits to spend quality time together and she did not feel that the environment was

appropriate for visits. She said that she missed Richard's school and medical activities, which she was required to attend, because the foster mother did not notify her of more than one of Richard's doctor's appointments and she received information late about events at Richard's Head Start program. She said that she had been looking for a job, but had no formal job training or employment history.

At the termination hearing, the probate court terminated respondent's parental rights upon finding that clear and convincing evidence existed to support termination under MCL 712A.19b(3)(c)(i); MSA 27.3178(598.19b)(3)(c)(i) (conditions leading to the adjudication continue to exist) and MCL 712A.19b(3)(c)(ii); MSA 27.3178(598.19b)(3)(c)(ii) (other conditions exist). It found respondent's substance abuse problem to be an original condition and that her missed and poor quality visitations constituted the "other condition."

The probate court's decision regarding termination of parental rights is reviewed in its entirety for clear error. *In re Hall-Smith*, 222 Mich App 470, 472; 564 NW2d 156 (1997). A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that the lower court made a mistake. *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996). The court must terminate the rights of a parent to a child if the court finds by clear and convincing evidence that at least one of the statutory grounds for termination exist, unless it also finds that termination is clearly not in the child's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *Hall-Smith, supra* at 472 The respondent bears the burden of going forward with evidence that termination of parental rights is clearly not in the best interests of the child. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *Hall-Smith, supra* at 472-473. "Absent any evidence addressing this issue by the parent, termination of parental rights is mandatory." *Id*. at 473.

In this case, respondent argues that the court erred by terminating her parental rights. In view of the substantial deference owed the probate court, we are unable to conclude that the court acted in a clearly erroneous manner. There was sufficient evidence presented to support the termination of respondent's parental rights. First, respondent did demonstrate difficulty addressing her dependence on alcohol and had several setbacks both with respect to alcohol and marijuana. Although she may have made a genuine and concerted attempt to get counseling for her problems, we are not convinced that the probate court erred by finding that the original problematic conditions had not yet been rectified.

The probate court found respondent's lack of quality visitation to be the second, "other condition" supporting termination under MCL 712A.19b(3)(c)(ii); MSA 27.3178(598.19b) (3)(c)(ii). The evidence supports a conclusion that respondent was not conscientious with respect to her visitation and that she did not accord her son significant attention during her visits. The repeated and consistent failure of respondent to respond to her son and make him the focus of her attention belies her claim that she gave priority to her relationship with her son. Although her attendance did markedly improve after 1996, the quality of the visits did not and there did not appear to be any sort of bond established between mother and son on which to build a relationship if he were returned to her care. Respondent's series of excuses for her lack of progress in meeting her obligations only reinforces the merits of the probate court's decision, in our judgment.

In any event, we are not empowered to simply substitute our view of the facts for that of the probate court. Thus, since we are not left with a definite and firm conviction that the probate court made a mistake, we will not disturb its decision. There was sufficient evidence to show that even short visits between respondent and Richard were difficult and that respondent was not making significant progress toward being able to deal well with her son in the near future. Therefore, the probate court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence. MCR 5.974(I); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Further, respondent failed to show that the termination of her parental rights was not clearly in her child's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5). She failed to recognize the standard of review set forth in MCL 712A.19b(5); MSA 27.3178(598.19b)(5) and *Hall-Smith, supra* at 472-473 and did not present any evidence that termination of her parental rights was clearly not in Richard's best interests. Accordingly, respondent has not satisfied her statutory burden in light of the probate court's findings.

Respondent also claims that the probate court erred in failing to give her proper notice, a hearing, and a reasonable opportunity to rectify the "other conditions." We disagree. The record demonstrates that petitioner repeatedly informed respondent of her need to consistently visit with her son. She was provided that opportunity throughout this case. Therefore, any deficiencies in this area rest on respondent and we find that this issue has no merit.

Next, respondent challenges the probate court's exercise of jurisdiction. Although subject matter jurisdiction may be attacked at any time, the exercise of discretion in applying that jurisdiction cannot be challenged in a collateral attack. *In re Hatcher*, 443 Mich 426, 439-40; 505 NW2d 834 (1993). *Hatcher* expressly overruled *Fritts v Krugh*, 354 Mich 97; 92 NW2d 604 (1958), in which the Court allowed a collateral appeal of a claim regarding the exercise of jurisdiction, i.e., that there was insufficient evidence to support a neglect petition. *Hatcher* held instead that the court's "jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous." *Hatcher, supra* at 444. Here, there is no dispute that the probate court was authorized to hear abuse, neglect and termination cases, and the petition alleged sufficient information so that it was not clearly frivolous. MCL 712A.2(b); MSA 27.3178(598.2)(b). Although respondent could have directly appealed the exercise of jurisdiction by appealing the initial determination, she cannot now collaterally attack it on appeal from the termination decision. *Hatcher, supra* at 436, 444.

Finally, respondent's constitutional argument regarding the procedures followed mainly by the original probate judge involved in this matter, Judge William Hupy, was not raised below.[2] Because it is not decisive to the outcome of this case, we decline to review it. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997); *McCready v Hoffius*, 222 Mich App 210, 218; 564 NW2d 493 (1997).

For these reasons, we affirm the probate court's termination of respondent's parental rights.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] At this time, petitioner Family Independence Agency's (FIA's) predecessor, the Department of Social Services (DSS) was still in existence. Throughout this opinion, the term "petitioner" encompasses either or both the DSS or FIA as appropriate.

[2] Judge Hupy is the brother of the original protective services worker involved in this case, Kathi Hupy. Respondent argued that this relationship led to a conflict of interest situation in which Judge Hupy issued orders allowing petitioner to take Richard into custody without following the procedural safeguard of a properly noticed hearing to establish jurisdiction. Judge Hupy was subsequently disqualified. Respondent also argued that her due process rights were impacted because the case took too long, and the agency unilaterally stopped services before a judicial determination of termination.