STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of LANCE WHITTIS, JR., Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ANGELA ANNETTE DAVIS,

Respondent-Appellant,

and

LANCE WESLEY WHITTIS,

Respondent.

UNPUBLISHED
April 2, 1999

No. 212791
Wayne Circuit Court
Family Division
LC No. 88-269399

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Respondent-appellant Angela Davis ("respondent") appeals from a family court order terminating her parental rights to the minor child. We affirm.

I. Basic Facts And Procedural History

Respondent is the biological parent of the minor child named in this matter. Petitioner filed a single petition in February of 1997 to both assume jurisdiction over the minor child and to terminate respondent's parental rights. At a hearing in May of 1998, the family court, sitting without a jury, found that it had jurisdiction over the minor child and that respondent's parental rights should be terminated. Her rights were terminated under MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g).[1] The family court entered an order on May 19, 1998, terminating respondent's rights, which respondent has appealed as of right.

II. Standards Of Review

A. Jurisdiction

The arguments of the parties on this issue involve different standards of review. First, counsel for the minor child argues that this Court lacks jurisdiction. Whether respondent is collaterally challenging the family court's decision on jurisdiction involves a question of law. This Court reviews questions of law under the de novo standard. *In re Rupert*, 205 Mich App 474, 479; 517 NW2d 794 (1994).

Second, on the merits of respondent's argument regarding the family court's decision to exercise jurisdiction, we review that decision for clear error in light of the family court's findings of fact. *In re SR*, 229 Mich App 310, 314; 581 NW2d 291 (1998).

Third, this Court reviews the question of whether the family court properly exercised jurisdiction on established facts under the de novo standard. This Court, upon reviewing the facts and law, must still decide whether there was a sufficient basis for the family court to assume jurisdiction. *In re Toler*, 193 Mich App 474, 476; 484 NW2d 672 (1992).

B. Due Process

The standard of review for questions of law is the de novo standard. *In re Rupert, supra*, 205 Mich App at 479.

C. Clear And Convincing Evidence

This Court reviews a probate court's findings of fact in a parental termination case under the clearly erroneous standard. A finding of fact is clearly erroneous when the reviewing court has a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); MCR 5.974(I). Deference must be accorded to the probate court's assessment of the credibility of the witnesses before it. *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991)

The burden of proof is on the petitioner to show that a statutory ground for termination exists by clear and convincing evidence. However, after that burden is met, the respondent has the burden of coming forward with evidence that termination is clearly not in the child's best interests. Absent any evidence that termination is clearly not in the child's best interests, termination of the parent's rights is mandatory under the revised standard found at MCL 712A.19b(5); MSA 27.3178(598.19b)(5). *In re Hall-Smith*, 222 Mich App 470, 472-473; 564 NW2d 156 (1997). In *In re Hall-Smith, supra*, a panel of this Court held that if there is no showing by the respondent of what is in the child's best interests, then a trial court has no discretion and must terminate a parent's rights. The probate court's decision regarding termination is reviewed in its entirety for clear error. *In re Hamlet (After Remand)*, 225 Mich App 505, 515; 571 NW2d 750 (1997).

III. Jurisdiction

Respondent challenges the family court's decision to assert jurisdiction over the minor child. Initially, we reject the argument of the counsel for the minor child that this issue is not properly before this Court because respondent did not timely pursue an appeal of the jurisdictional decision. See *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993). The collateral estoppel bar of *Hatcher* applies only if, at the adjudicatory stage, there was a written order from which the respondent could appeal. *In re Bechard*, 211 Mich App 155, 159-160; 535 NW2d 220 (1995). In this case, the petition requesting jurisdiction also requested termination of respondent's parental rights at the initial dispositional hearing. A single order was entered both declaring the minor child to be within the jurisdiction of the family court and terminating respondent's parental rights. It is from this order that respondent now appeals. Therefore, respondent's argument challenging the family court's jurisdiction is properly before this Court. *Id.*

Respondent contends that, as a matter of law, the family court could not assume jurisdiction pursuant to MCL 712A.2(b)(1); MSA 27.3178(598.2)(b)(1), solely on the basis of her incarceration, given that her incarceration prevented her from being able to provide support or care for her child. We conclude that respondent's argument is lacking in merit, both legally and factually. As a matter of law, neglect need not be culpable to support an exercise of jurisdiction under MCL 712A.2(b); MSA 27.3178(598.2)(b). *In re Jacobs*, 433 Mich 24; 444 NW2d 789 (1989). As a matter of fact, respondent was not incarcerated during the entire period of time that her child was under the care of a guardian. She had the ability at least to maintain regular contact with her child, but failed to do so.

Contrary to respondent's argument, the fact that her child was placed with a guardian, and was being cared for by the guardian at the time of the hearing, did not preclude the family court from exercising jurisdiction. The circumstance described in MCL 712A.2(b)(1)(B); MSA 27.3178(598.2)(b)(1)(B), in the context of this case, would be applicable only if respondent had placed her child with another legally responsible person *before* her incarceration. *In re Systma*, 197 Mich App 453, 455; 495 NW2d 804 (1992). The evidence in this case established that respondent did not place her child with the guardian. Rather, it was the state social worker who made these arrangements *after* respondent was incarcerated. Indeed, there was evidence that respondent actually opposed the guardianship arrangement. Thus, the family court did not err in finding that § 2(b)(1)(B) did not apply in this case.

After reviewing the record, we hold that grounds for assuming jurisdiction over the child pursuant to § 2(b)(1) were properly established by a preponderance of the evidence. *In re Brock*, 442 Mich 101, 108-109; 499 NW2d 752 (1993).

IV. Due Process

Respondent claims that she was denied due process because the petition did not specifically refer to § 19b(3)(g) as a basis for terminating her parental rights. The same factual elements that the family court relied on in finding that termination was proper under § 19b(3)(g) were contained in the statutory subsections and factual allegations contained in the petition. We hold that the petition was

sufficient to provide respondent with notice that her parental rights could be terminated under § 19b(3)(g) and, accordingly, respondent's right to due process was not violated. *In re Perry*, 193 Mich App 648, 651; 484 NW2d 768 (1992); *In re Slis*, 144 Mich App 678, 683-684; 375 NW2d 788 (1985).

V. Clear And Convincing Evidence

Respondent argues that the family court clearly erred in finding that § 19b(3)(g) was established by clear and convincing evidence. MCR 5.974(I); *In re Miller*, *supra*. We hold that there was no such clear error. Further, we hold that respondent failed to show that termination of her parental rights was clearly not in the child's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Hall-Smith*, *supra*. Thus, the family court did not err in terminating respondent's parental rights to the child. *Id*.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

[1] Subsection 3(g) permits termination where the parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to do so within a reasonable time considering the age of the child.