STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of PATRICK R. THOMPSON and MARIE THOMPSON, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JEREMY THOMPSON and STARR BURGESS,

Respondents-Appellants.

UNPUBLISHED
November 30, 1999

Nos. 216387;217877
Oakland Circuit Court
Family Division
LC No. 98-607615 NA

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

PER CURIAM.

Respondents appeal as of right from a family court order terminating their parental rights to the minor children under MCL 712A.19b(3)(b)(i), (b)(ii), (g), (j) and (k)(iii); MSA 27.3178(598.19b)(3)(b)(i), (b)(ii), (g), (j) and (k)(iii). We affirm.

After reviewing the evidence presented at trial, we cannot conclude that the family court committed clear error in finding that all the statutory grounds for termination were established by clear and convincing evidence with respect to each respondent. MCR 5.974(I); *In re JS & SM*, 231 Mich App 92, 97; 585 NW2d 326 (1998).

We reject respondent father's claim that he was unfairly denied the opportunity to argue against termination of his parental rights pursuant to subsections (g), (j) and (k)(iii), because petitioner did not notify him that it was seeking termination pursuant to these subsections. Approximately one month before trial began, the trial court granted petitioner's motion to amend the termination petition to add these subsections as bases for termination. MCL 712A.11(6); MSA 27.3178(598.11)(6). Additionally, petitioner clearly stated at the outset of closing argument that it was seeking termination pursuant to subsections (b)(i), (b)(ii), (g), (j) and

(k)(iii).[1] Thus, there is no merit to respondent father's argument that he lacked notice of petitioner's intent to seek termination pursuant to these subsections.

Furthermore, the family court did not clearly err in finding that termination of parental rights was warranted under subsections (b)(i) and (b)(ii). Therefore, even if respondent father received inadequate notice of petitioner's intention to seek termination pursuant to the additional subsections, because only one statutory ground is required in order to terminate parental rights, *In re JS & SM, supra* at 97, appellate relief is not warranted.

Next, respondents argue that the family court violated the court rules by failing to hold a separate dispositional hearing after completing the adjudicative portion of the proceedings, and further, prevented respondents from eliciting evidence concerning the children's best interests. Interpretation and application of court rules presents a question of law for de novo review by this Court. *Szymanski v Brown*, 221 Mich App 423, 433; 562 NW2d 212 (1997).

MCR 5.974(D) allows for termination of parental rights at the initial dispositional hearing where certain circumstances exist. Because this case met all of the requirements of MCR 5.974(D), termination of parental rights was justified at the initial disposition. Here, the family court held one hearing, which combined the adjudicative part, the portion of the hearing that is held to determine whether the child comes within the family court's jurisdiction, MCR 5.972; *In re Nunn*, 168 Mich App 203, 207; 423 NW2d 619 (1988), with the dispositional phase, which is the portion of the hearing that is held to determine measures to be taken by the court with respect to the child that is properly within its jurisdiction, MCR 5.973; *In re Nunn*, *supra*. The family court did not violate the court rules by doing so, or otherwise interfere with respondents' ability to present evidence regarding the children's best interests. First, petitioner made respondents aware in July 1998 that it was seeking termination of their parental rights at the hearing that began in August 1998. Second, the court rules do not mandate that the family court hold the adjudicative trial and the disposition hearing separately. MCR 5.973(A) provides generally that the family court must hold a dispositional hearing once the court decides that a child comes within its jurisdiction. However, the rule also provides that "[t]he interval, *if any*, between the trial and the dispositional hearing is within the discretion of the court." MCR 5.973(A)(2) (emphasis added). Therefore, under the present circumstances, where respondents were fully aware that termination of their parental rights was sought immediately, the family court properly exercised its discretion by deciding to hold the dispositional hearing immediately after the adjudicative portion, or, indeed, simultaneously.

Although respondents' position is that the trial court should have held a separate hearing on the issue of the children's best interests, they did not present evidence relevant to this issue, as was their burden. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re JS & SM, supra* at 97-98.

---

[1] We acknowledge that petitioner stated it sought termination pursuant to statutory subsection (k)(ii). However, in light of the July 1998 motion to amend the petition, which clearly stated subsection (k)(iii) as a ground for termination, and the fact that (k)(ii) pertains to sexual abuse, a kind of harm not present in this case, petitioner clearly misspoke at the outset of closing argument. However, there is no indication and little chance that respondent father was misled by petitioner's mistake.

Respondents contend that differing evidentiary standards applicable to each portion of the proceeding prevented them from doing this. It is true that the evidentiary standards concerning the adjudicative and dispositional phases differ. To establish that the family court has proper jurisdiction, petitioner must submit evidence in accordance with the rules of evidence for a civil proceeding. MCR 5.972(C)(1). As for the dispositional phase, all relevant and material evidence is admissible, notwithstanding evidentiary rules. MCR 5.974(F)(2). However, as petitioner notes, there is no indication that the family court misapplied the rules of evidence and no indication that respondents possessed any evidence relevant to the best interests determination. Furthermore, in light of the evidence that respondents seriously physically abused their children, it is highly unlikely respondents could have established that termination of their parental rights clearly contravened the children's best interests.

Lastly, respondent father argues that he was denied the effective assistance of counsel because his attorney failed to present expert testimony to counter petitioner's medical evidence that minor Marie likely had suffered broken bones on certain past occasions. An indigent parent involved in a hearing that may terminate his parental rights is entitled to appointed counsel. The right to counsel includes the right to competent counsel. In analyzing claims of ineffective assistance of counsel at termination hearings, this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988).

To establish ineffective assistance of counsel, a respondent in a termination proceeding must establish two things. First, the respondent must show that counsel's performance was deficient, i.e., that counsel made errors so egregious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the respondent must show that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the respondent of a fair trial, a trial whose result is reliable. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). To the extent that a claim of ineffective assistance of counsel is predicated on facts not of record, a respondent must make a testimonial record at the trial court level in connection with a motion for a new trial that evidentially supports his claim and that excludes hypotheses consistent with the view that his attorney represented him adequately. *Id*. at 6. Where, as here, a party fails to do so, appellate review is limited to errors apparent from the existing record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Respondent father argues that his counsel was ineffective because he failed to present an expert witness to rebut doctors' testimony that Marie's x-rays indicated several of her bones may have been broken in the past. The decision whether to call an expert witness is considered a permissible exercise of trial strategy. *People v Cooper*, 236 Mich App 643, 658; ___ NW2d ___ (1999). As respondent father acknowledges, questions were asked of petitioner's experts in an attempt to establish doubt as to whether their interpretation of Marie's x-rays was sound, or whether the bone irregularities they noted could have had other sources. Without more, respondent-father has failed to demonstrate that his attorney's decision not to call additional

expert witnesses to address this evidence constituted anything other than a sound exercise of trial strategy.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Hilda R. Gage