# STATE OF MICHIGAN

# COURT OF APPEALS

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In the Matter of PCG, Minor.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

DEBRA CHOLEWINSKI,

Respondent-Appellant.

UNPUBLISHED
October 31, 2000

No. 223528
Menominee Circuit Court
Family Division
LC No. 97-000043-NA

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In the Matter of JD, Minor.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

DEBRA CHOLEWINSKI,

Respondent-Appellant.

No. 223529
Menominee Circuit Court
Family Division
LC No. 98-000001-NA

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In the Matter of JC, Minor.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

No. 223530

Menominee Circuit Court
Family Division
LC No. 98-000073-NA

DEBRA CHOLEWINSKI,

Respondent-Appellant,

and

GREGORY DOYEN,

Respondent.

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Before: Gribbs, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Respondent-appellant (respondent) appeals by right from a family court order terminating her parental rights to the minor children under MCL 712A.19b(3)(c) and (g); MSA 27.3178(598.19b)(3)(c) and (g). We affirm.

Respondent challenges the trial court's exercise of jurisdiction over "JD" and "JC," arguing that the verdict form at the adjudication trial did not allow the jury to consider the question of jurisdiction with regard to each child individually. Initially, we note that this issue is not properly before us because respondent did not file a direct appeal from the July 1, 1999 order adjudicating the children as being within the court's jurisdiction in accordance with the jury's verdict. See *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993); *In re Bechard*, 211 Mich App 155, 158; 535 NW2d 220 (1995); *In re Powers*, 208 Mich App 582, 587; 528 NW2d 799 (1995). Regardless, however, respondent has not shown that appellate relief is warranted.

Jury instructions in a child protection proceeding are subject to the same court rule, MCR 2.516, that governs civil actions generally, and to the harmless error provision of MCR 2.613(A). See MCR 5.901(B)(1), 5.902(A) and 5.911(C). Whether a requested instruction is applicable and accurate is within the discretion of the trial court. *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985); *Bordeaux v Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993). An instructional error is harmless unless the error results "in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be 'inconsistent with substantial justice.'" *Johnson, supra* at 327, quoting MCR 2.613(A).

In this case, respondent apparently did not request SJI2d 97.03, which encompasses the verdict form requested by respondent's attorney. It appears that neither counsel was aware of the instruction until after appellate briefs in this matter were filed. Giving due regard to the particular "personality" of this case and the parties' theories, we are not persuaded that the instruction was necessary for a balanced and fair jury charge, or that the trial court otherwise abused its discretion in refusing to give respondent's instruction in the context of this case. *Johnson, supra* at 327.

Next, because respondent did not file a direct appeal from the July 1, 1999, jurisdictional decision, we are not convinced that respondent's challenges to the sufficiency and weight of the evidence at the adjudication stage are properly before us. *In re Hatcher, supra*. In any event, based on our de novo review of the trial record, with due consideration being given to the anticipatory neglect theory pursued by petitioner, we are satisfied that there was sufficient evidence to enable the jury to find a statutory basis for jurisdiction by a preponderance of the evidence. The trial court did not err in denying respondent's request for a directed verdict. MCL 712A.2(b)(1) and (2); MSA 27.3178(598.2)(b)(1) and (2); *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 634-635; 601 NW2d 160 (1999). Further, any challenge to the weight of the evidence is not properly before us because respondent did not first raise this issue through an appropriate motion in the trial court. See *Hyde v Univ of Michigan Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997).

Next, respondent has not established any basis for vacating the trial court's exercise of jurisdiction over the oldest child, "PCG," based on respondent's 1995 plea of admission. The proper procedure for presenting such a claim to the trial court is a motion for rehearing under MCR 5.992 and MCL 712A.21; MSA 27.3178(21). Even if we were to treat respondent's motion as one seeking rehearing,[1] we would find that grounds for relief were not established. The operative principle under MCR 5.992, when read in conjunction with the harmless error standard in MCR 2.613(A), is whether the refusal to grant a rehearing would be inconsistent with substantial justice. *In re Alton*, 203 Mich App 405, 409; 513 NW2d 162 (1994). The trial court has discretion when ruling on a motion for rehearing. The judge "may affirm, modify, or vacate the decision previously made . . . ." MCR 5.992(D). In the case at bar, even if we were to apply, by analogy, the standards for assessing mental competency for a criminal plea to respondent's plea of admission, we would find no basis for vacating the January 21, 1999, order because the record adequately establishes that respondent's plea was an understanding one under MCR 5.971(C).[2] *People v Matheson*, 70 Mich App 172; 245 NW2d 551 (1976).

Finally, we have considered respondent's challenge to the order terminating her parental rights to the children. Although respondent challenges the sufficiency of the evidence in support of termination, she has not briefed the statutory criteria applicable to §§ 19b(3)(c)( and (g), which served as the statutory bases for the trial court's decision. Under these circumstances, we could consider this claim abandoned. Cf. *In re JS & SM*, 231 Mich App 92, 98; 585 NW2d 326 (1998), and see generally *Community Nat'l Bank v Michigan Basic Property Ins Ass'n*, 159 Mich App 510, 520-521; 407 NW2d 31 (1987). In any event, the trial court's finding that § 19b(3)(g) was established by clear and convincing evidence was not clearly erroneous. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The trial court may terminate parental rights if it finds that at least one statutory ground for termination is proven with respect to each child. MCR 5.974(I), *In re Sours*, 459 Mich 624, 632; 593

[1] The mislabeling of a motion will not preclude review where the lower court record otherwise permits it. *Flanders Industries, Inc v Michigan*, 203 Mich App 15, 18 n 1; 512 NW2d 328 (1993).

[2] Respondent also challenged the factual basis of her plea of admission when moving to withdraw her plea in the trial court, but she has not briefed that aspect on appeal and, therefore, we deem that issue abandoned. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).

NW2d 520 (1999). Further, the evidence did not establish that termination of respondent's parental rights was clearly not in the children's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000).

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra