STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of PAULA PURDY, CARL PURDY, COLLETTE PURDY, ALYSSA DURANT, MISSY DURANT, and MATTHEW DURANT, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

LINDA DURANT,

Respondent-Appellant,

and

DEAN FARRIS,

Respondent.

UNPUBLISHED
March 30, 2001

No. 225936
Monroe Circuit Court
Family Division
LC No. 98-013502-NA

Before: K. F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Respondent-appellant Linda Durant appeals as of right from the circuit court order terminating her parental rights to the minor children under MCL 712A.19b(3)(c)(i), (g) and (j); MSA 27.3178(598.19b)(3)(c)(i), (g) and (j). Although we conclude that the circuit court erred neither in its findings of fact nor by ordering termination of appellant's parental rights, we must conditionally affirm and remand with instructions for petitioner to provide proper notice of these proceedings to any interested Indian tribe, as required by the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*.

I. Indian Child Welfare Act

Appellant first contends that the circuit court failed to properly determine whether the children were eligible for membership in an Indian tribe and failed to ensure that petitioner notified the applicable tribe or tribes of the instant proceedings, as required by the ICWA. Whether a circuit court satisfied the notice obligation imposed by the ICWA is a legal question

involving statutory interpretation, which this Court reviews de novo. *In re IEM*, 233 Mich App 438, 443; 592 NW2d 751 (1999).

Under the ICWA, any interested Indian tribe must receive notice of termination proceedings involving Indian children:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. [25 USC 1912(a).]

The Michigan Court Rules also require the circuit court to inquire if a child or parent involved in a child protective proceeding is a registered member of any American Indian tribe or band, or if the child is eligible for such membership. MCR 5.965(B)(7). If the court determines that the child or parent meets these criteria, the court must follow the procedures set forth in MCR 5.980. That rule requires that the petitioner comply with the notice requirements of the ICWA:

> (A) If any Indian child as defined by the Indian Child Welfare Act, 25 USC 1901 *et seq*. is the subject of a protective proceeding . . . the following procedures shall be used:
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> * * *
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> (2) If the Indian child does not reside on a reservation, the court shall ensure that the petitioner has given notice of the proceedings to the child's tribe and the child's parents or Indian custodian and, if the tribe is unknown, to the Secretary of the Interior. [MCR 5.980(A)(2).]

In the present case, both petitioner and the circuit court were on notice of the children's alleged American Indian heritage, including both Cherokee and Chippewa Indian descent. Petitioner argues that it complied with the notice requirements contained in the ICWA and the Michigan Court Rules. Petitioner did provide evidence that it sent correspondence to the Secretary of the Interior. The Secretary responded, advising petitioner that there were only two federally recognized Cherokee Indian tribes, the Cherokee Nation of Oklahoma and the Eastern Band of Cherokee Indians. The Secretary also directed petitioner to directly notify the appropriate tribe or tribes of the right to intervene with regard to these children.

Petitioner introduced evidence that the Cherokee Nation of Oklahoma responded to its notice, declining to intervene. However, the record contains no evidence supporting petitioner's claim that it contacted the Eastern Band of Cherokee Indians. Further, the record contains no

evidence that petitioner notified the Secretary of the children's possible Chippewa Indian heritage, or contacted any Chippewa Indian tribes about the children. If petitioner can provide evidence that it did notify the applicable tribes and that the tribes failed to respond, petitioner has no further obligation under the ICWA:

> Only after notice has been provided and a tribe has failed to respond or has intervened but is unable to determine the child's eligibility for membership does the burden shift to the parties to show that the ICWA still applies. [*In re IEM*, *supra* at 449 (citation omitted).]

However, such proofs are not contained in the record before us. Therefore, we must conditionally affirm the circuit court's order, remanding with instructions for petitioner to provide proper notice to the Eastern Band of Cherokee Indians and the federally recognized Chippewa Indian tribes, or provide proof that it has already done so and that the tribes have either declined to intervene or have failed to respond. *In re IEM*, *supra* at 450.

II. Trial Court's Exercise of Jurisdiction

Appellant next contends that the circuit court lacked jurisdiction over the children because the court disregarded a preliminary agreement between petitioner and appellant, relied on hearsay evidence, and demonstrated bias against appellant. We conclude that appellant's argument attacks the procedure utilized by the circuit court after it established subject matter jurisdiction, rather than attacking the existence of subject-matter jurisdiction itself. Our Supreme Court recognized the distinction between these two concepts in the case of *In re Hatcher*, 443 Mich 426, 439; 505 NW2d 834 (1993), stating: "[g]enerally, lack of subject matter jurisdiction can be collaterally attacked and the exercise of that jurisdiction can be challenged only on direct appeal." Because appellant did not directly challenge the circuit court's decision to exercise jurisdiction over the children, she can not collaterally challenge that decision on appeal from the order terminating her parental rights. *Id.*; *In re Powers*, 208 Mich App 582, 587-588; 528 NW2d 799 (1995). Because appellant's argument is not properly before this Court, we need not address it.

III. Plea Withdrawal

Appellant next contends that she should be allowed to withdraw her plea to several of the petition's allegations. Appellant argues that her plea was neither knowingly, understandingly, nor voluntarily made, and that the plea agreement was illusory. First, we note that appellant's argument is not properly before this Court because she never filed a motion in the circuit court requesting withdrawal of her plea.[1] Nevertheless, assuming that appellant did preserve the issue for our review, we conclude that her argument is without merit.

[1] Appellant did file a motion to strike several of the allegations contained in the termination petition. In the course of arguing that motion, appellant argued that the trial court should permit her to withdraw her plea if the court denied her motion to strike the allegations. The circuit court denied the motion to strike, but did not specifically address the plea withdrawal issue.

While termination proceedings need not conform to all the requirements of a criminal proceeding, this Court will apply the same principles developed in criminal cases for plea withdrawals. *In re Zelzack*, 180 Mich App 117, 125; 446 NW2d 588 (1989). Once a plea has been accepted in a termination case, there is no absolute right to withdraw the plea. *Id*. at 126. We are satisfied from the record before us that the trial court advised appellant of her rights during the plea proceeding and that appellant consistently acknowledged her understanding of those rights. Therefore, we conclude that the trial court properly accepted appellant's plea.

IV. Statutory Grounds for Termination and Best Interest Factors

Appellant next contends that the circuit court committed clear error when it determined that petitioner proved at least one statutory ground for termination by clear and convincing evidence. Appellant also contends that the circuit court committed clear error when it determined the children's best interests. We disagree.

In a termination hearing, the petitioner bears the burden of demonstrating at least one statutory basis for termination by clear and convincing evidence. MCR 5.974(F)(3); *In re Trejo Minors*, 462 Mich 341, 360; 612 NW2d 407 (2000). Once that statutory basis for termination is shown, the trial court shall terminate parental rights unless it finds that doing so is clearly not in the child's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); MCR 5.974(F)(3); *Trejo*, *supra* at 344. This Court reviews for clear error both the trial court's decision that a ground for termination has been proven by clear and convincing evidence and the court's decision regarding the children's best interests. *Id*. at 356-357.

The circuit court terminated appellant's parental rights under MCL 712A.19b(3)(c)(i), (g) and (j); MSA 27.3178(598.19b)(3)(c)(i), (g) and (j). Appellant admitted that she tested positive for marijuana when one of her children was born. The evidence produced below supports a finding that appellant failed to address her drug abuse problem during the pendency of this case, testing positive for marijuana on numerous occasions and failing to provide other drug screens when requested. Further, the record supports a finding that appellant's continued drug use, as well as her failure to maintain stable employment or stable housing, rendered her unable to properly care for the children. Finally, the record supports a finding that, while appellant was the children's primary caregiver, she neglected and abused the children and failed to obtain adequate medical care for them. Based on our review of this record, we cannot conclude that the trial court committed clear error.

V. Ineffective Assistance of Counsel

Appellant next contends that she was denied the effective assistance of counsel during these termination proceedings. When analyzing ineffective assistance of counsel claims in termination cases, we apply the analogous principles developed in criminal proceedings. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988).

We reject appellant's claim that she was denied the effective assistance of counsel. Effective assistance is presumed, and the respondent bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective

assistance, appellant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and must also show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *Effinger, supra* at 69. Here, appellant has not identified how her counsel's actions or inactions affected the outcome of this proceeding. Therefore, appellant has failed to establish that she was denied the effective assistance of counsel.

VI. Appointment of Attorney to Represent the Children's Interests

Finally, appellant contends that the trial court erroneously failed to appoint an attorney to represent the interests of her three older children, pursuant to MCL 712A.17d(2); MSA 27.3178(598.17d)(2). The interpretation of a statute is a question of law that we review de novo on appeal. *In re Lang*, 236 Mich App 129, 136; 600 NW2d 646 (1999).

It is undisputed that respondent's three oldest children wished to return to appellant's care and custody. It is likewise undisputed that the lawyer-guardian ad litem ("GAL") supported termination of respondent's parental rights. The fact that the GAL supported termination against the children's wishes does not mean that the circuit court had a duty to appoint an attorney for the children. Although § 17d(2) recognizes that a circuit court *may* appoint an attorney where the children's wishes are inconsistent with the GAL's determination of the children's best interests, the court is not required to do so. In this case, the GAL appropriately advised the court of the children's wishes. The GAL also advised the court that the children's wishes were inconsistent with his determination of their best interests. Because appellant fails to demonstrate that the circuit court abused its discretion in denying her request, or that the outcome would have been different if the circuit court had granted her request, this claim does not require reversal.

We conditionally affirm the order terminating respondent's parental rights and remand for the limited purpose of providing proper notice of these proceedings to the appropriate American Indian tribes, pursuant to the ICWA. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter