STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JESSICA PICKARD, A Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JAMES D. CARLL,

Respondent-Appellant.

UNPUBLISHED
June 5, 2001

No. 230076
Genesee Circuit Court
Family Division
LC No. 95-103258-NA

Before: K. F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Respondent appeals as of right from a decision of the circuit court terminating his parental rights to his daughter, pursuant to MCL 712.19b(3)(c)(i), (g) and (h); MSA 27A.3178(598.19b)(3)(c)(i), (g) and (h). We affirm.

I. Basic Facts and Procedural History

A petition seeking to terminate respondent's[1] parental rights was filed on May 24, 2000. The statutory grounds asserted were MCL 712.19b(3)(g), (h) and (i); MSA 27A.3178(598.19b)(3)(g), (h) and (i) which provide:

> The court may terminate the parental rights of a parent to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *
>
> (g) 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

[1] The petition also sought termination of the mother's parental rights. She is not a party to this appeal.

provide proper care and custody within a reasonable amount of time considering the child's age.

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

(i) Parental rights to 1 or more siblings of the child have been terminated due to chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

At the termination hearing, petitioner established that the minor child first came under the jurisdiction of the court in 1995[2] and had been in foster care since September, 1997. The court took judicial notice that respondent's parental rights to two siblings of the minor child had been previously terminated. The court received, without objection, a certified copy of a conviction dated June 11, 1997 against respondent for Operating While Under the Influence of Intoxicating Liquor (OUIL) third offense[3], and Driving While License Suspended.[4] On May 23, 2000, respondent had been sentenced to serve forty to eighty four months[5] on this conviction. At the time that this matter was scheduled for a termination trial, respondent was still incarcerated. He did not appear for the hearing, but was represented by counsel.

At the close of the proceedings, the referee found that clear and convincing evidence existed on the record to terminate respondent's parental rights pursuant to MCL 712.19b(3)(c)(i), (g) and (h); MSA 27A.3178(598.19b)(3)(c)(i), (g) and (h).

Respondent raises three issues in his appeal. First, he argues that the trial court erred when it terminated his parental rights on statutory grounds not specifically set forth in the initial petition. Second, he claims that the trial court committed error requiring reversal when it held that termination of respondent's rights would be in the child's best interest. Finally, he alleges the trial court erred by failing to secure his presence at the hearing, thus depriving him of due process.

II. Termination of Parental Rights and Best Interests

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[2] The other two children named in the 1995 petition were Jessica Pickard's two younger brothers, Joshua J. Pickard (DOB 03-21-84) and Jamie L. Carll (DOB 05-05-85) who are not the subject of the instant appeal.

[3] MCL 257.625(8)(c); MSA 9.2325(8)(c).

[4] MCL 257.320 *et.seq.*; MSA 9.2020 *et. seq.*

[5] The prosecutor also entered a series of Orders dating from June 11, 1997 through December 22, 1998 providing for probation and defining the terms thereof. On January 20, 1999, Respondent removed his tether without authorization causing the court to issue a Bench Warrant for his return. On March 3, 1999, the authorities located respondent and again took him into custody.

Where termination of parental rights is sought, the existence of a statutory ground for termination must be established by clear and convincing evidence. MCR 5.974(A), (F)(3); *In re Bedwell*, 160 Mich App 168, 173; 408 NW2d 65 (1987); see also MCL 712A19b(1); MSA 27.3178(598.19b)(1). The trial court's findings of fact are reviewed for clear error. *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). If the trial court finds at least one statutory ground for termination has been established by clear and convincing evidence, the trial court must terminate parental rights unless to do so is clearly not in the child's best interest. *In re Trejo Minors*, 462 Mich 341, 351; 612 NW2d 407 (1999).

Respondent submits that termination premised on MCL 712.19b(3)(c)(i)was improper because the grounds set forth in that subsection were not included in the initial petition to terminate his parental rights, thus effectively denying him notice and an opportunity to be heard as to those grounds. Respondent does not provide any authority for the proposition that a trial court commits error requiring reversal when it finds by the requisite clear and convincing evidence, a statutory basis for termination not otherwise included in the initial petition to terminate.

However, the trial court also terminated respondent's rights on subsections 19b(3)(g) and (h), which were cited in the petition for termination. Respondent does not contest these findings. The statute specifically states that the court may terminate parental rights where the court finds "by clear and convincing evidence, *1 or more* of the following . . . ." [Emphasis added]. A review of the record supports the trial court's finding that termination of respondent's parental rights was not clearly erroneous pursuant to subsections 19b(3)(g) and (h). Thus, we decline to find error requiring reversal.

Next, respondent argues that the trial court erred by determining that termination of his parental rights would serve the child's best interest. We disagree. Once the requisite statutory ground for termination is established by clear and convincing evidence, it is incumbent upon the parent to come forth with some evidence indicating that termination will not serve the child's best interests. *In Re Terry*, 240 Mich App 14; 610 NW2d 563 (2000). If the parent does not meet these burdens of production and of going forward with the evidence, then the family court's discretion is eliminated and the court has no other option but to terminate parental rights. *Id.*

At the time of the trial, the child was seventeen years old and had not yet completed high school. The FIA worker expressed concern that when the child turned eighteen, she would be "dropped out of the system" and cease receiving state assistance. However, if she remained in the system by becoming a permanent ward, she would receive funding for another year which would permit her to complete high school.

Considering that respondent did not come forth with any evidence indicating that it would not be in Jessica's best interest to terminate his parental rights, we find the court properly terminated respondent's parental rights. *In Re Terry*, 240 Mich App 14; 610 NW2d 563 (2000).

II. Respondent's Presence at Hearing

Respondent further argues that no effort was made to secure his attendance at the termination hearing thus further depriving him of due process. We disagree.

In support of his position, respondent wholly relies on our decision in *In re Render*, 145 Mich App 344; 377 NW2d 421 (1985) wherein we applied the three part balancing test[6] delineated by the United States Supreme Court in *Mathews v Eldridge*, 424 U.S. 319, 335, 96 S Ct 893, 903; 47 L Ed 2d 18 (1976)[7] and held that the state's failure to secure the parent's presence in court for the dispositional hearing violated due process. In *Render*, the respondent was in the county jail when she was served with notice of the hearing and her attorney did not learn of her incarceration until the day that the trial commenced. Nevertheless, without attempting to secure the respondent's presence, the probate court directed the prosecutor to proceed with his case in her absence. This court held that the probate court erred by not taking adequate steps to ensure the parent's presence. The *Render* court reasoned that termination of parental rights is indeed a substantial interest and on the facts, it was "impossible to determine whether [the parent] could have provided the attorney with information helpful to [the parent's] defense[,]" and thus impossible to ascertain any resulting prejudice. The court further reasoned that the burden on the state to put forth an effort to secure the parent's presence at the hearing was not "a substantial one" since the parent was incarcerated in the county jail.

We find that the case *sub judice* is factually distinguishable in a number of respects from the situation presented in *Render*. First, at the time that we decided *Render*, the statute then in effect required the parents to appear at the dispositional hearing. The current rendition of MCL 712A.19b(2)(c); MSA 27.3178(598.19b)(2)(c) however, only requires that the child's parents receive written notice of the hearing. Furthermore, MCR 5.973 (3)(b) provides that at the dispositional phase, respondent has the right to be present at the termination hearing or may appear through legal counsel.

Contrary to respondent's position, the case at bar more closely resembles the situation presented in *In Re Vasquez*, 199 Mich App 44; 501 NW2d 231 (1993). In *Vasquez, supra*, the respondent argued that the probate court's failure to secure his presence for the termination hearing denied him equal protection and due process on the grounds that at the time of the dispositional hearing, he was incarcerated in Texas serving an eight year sentence. In *Vasquez*, we recognized that the respondent's parental rights constituted a compelling interest, but nevertheless held that his absence did not increase the risk of an erroneous deprivation. In fact, the *Vasquez* court opined that on the record, "we are convinced that respondent's presence at the side of his counsel would have changed nothing" considering that the respondent was "well represented" by counsel at the termination proceedings. *Vasquez* at 234. Additionally, we recognized that "contrary to what *Render* seems to say, we do not believe that an incarcerated parent is entitled as a matter of absolute right to be present at the dispositional hearing of a proceeding to terminate parental rights." *Id.*

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[6] The test requires the court to balance "the private interest at stake, the incremental risk of an erroneous deprivation . . . in the absence of the procedure demanded, and the government's interest in avoiding the burden the procedure would carry." *Render, supra* at 348-349.

[7] The balancing test specified in *Mathews* was subsequently applied to termination proceedings in *Santosky v Kramer*, 455 US 745-756; 102 SCt 1388, 1395-1396; 71 Led2d 599 (1982).

Respondent was personally served with notice of the hearing more than a month preceding the termination hearing, thus giving him ample opportunity to file an appropriate motion before the court requesting that the court issue a writ to permit his attendance, or file a motion alternatively requesting an order permitting his presence by telephonic means. Indeed , as the court in *Vasquez* noted:

> In light of present-day telecommunications, other means that fall short of securing the physical presence of a parent are available to ensure that an incarcerated prisoner receives due process at a dispositional hearing. Had respondent wanted to provide evidence concerning his fitness and efforts to provide a fit home for his children, he could have been deposed by telephone or by videotape. Although respondent had a right to be deposed, he made no request. Even during the hearing, respondent's attorney could have conferred with his client by telephone concerning the progress of the case in order to allow respondent to assist his counsel in his defense. *The availability of such means of communication militates against securing the physical presence of an incarcerated parent at a dispositional hearing as a matter of due process*. [Emphasis added]. *Id.* at 49.

In the case at bar, respondent did not avail himself of any of these means to assert his presence in the case short of physical attendance. While we respect respondent's compelling interest in his parental rights, notwithstanding, given that respondent had ample opportunity to secure his presence between the time that he was personally served with the notice of the hearing and the date upon which the hearing commenced, and given that respondent's interests were well represented at trial by competent counsel[8], we hold that the court's failure to secure respondent's presence did not constitute a violation of respondent's due process as a review of the record reveals that respondent's presence at trial would have changed nothing and thus, respondent's absence did not increase the risk of an erroneous deprivation or otherwise result in any prejudice to respondent. *Vasquez* at 49.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper

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[8] In respondent's brief on appeal, respondent also suggests that his trial counsel was ineffective but otherwise fails to properly set forth the legal basis underlying his claim. Notwithstanding, we do not find that respondent's trial counsel was ineffective. Because respondent failed to raise his ineffective assistance of counsel argument by motion or request for evidentiary hearing, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Upon review of the entire record, we hold that respondent failed to establish that trial counsel's performance was deficient and but for that deficient representation, the result would have been different. *Id*. at 424. Accordingly, we do not find error requiring reversal premised on the ineffective assistance of counsel.