STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DC-C and JC-C, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

FE CORTEZ-CORILLA,

Respondent-Appellant,

and

ROMEGIA CORTEZ

Respondent.

UNPUBLISHED
November 6, 2001

No. 230595
Allegan Circuit Court
Family Division
LC No. 00-024791-NA

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ROMEGIO CORILLA,

Respondent-Appellant,

and

FE CORTEZ-CORILLA,

Respondent.

No. 230720
Allegan Circuit Court
Family Division
LC No. 00-024791-NA

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

In these consolidated appeals, respondents Fe Cortez-Corilla (mother) and Remegio Corilla[1] (father) appeal as of right the termination of their parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i), (c)(i), (j), and (k); MSA 27.3178(598.19b)(3)(b)(i), (c)(i), (j) and (k).[2] We affirm.

I. Facts and Proceedings

Respondents first came to the attention of petitioner Family Independence Agency (FIA) in 1995 following the death of one of respondents' three children. That child died on June 12, 1995 of subdural hematoma and retinal hemorrhaging attributed to "shaken baby syndrome."[3] At the time of the child's death, he was home alone with father, who called the ambulance. As a result of this death, father was convicted of involuntary manslaughter[4] and sentenced to five to fifteen years in prison.[5] After the child's death, the FIA filed a petition in Ottawa Circuit Court for termination of respondents' parental rights and both children were removed from respondents' home and placed in foster care. However, in June 1997, after the petition to terminate father's parental rights was denied by the court and the petition to terminate mother's parental rights was withdrawn by the FIA, the children were dismissed from court wardship and returned to their mother's care.[6]

Following the return of the children and father's incarceration, mother moved in with Juan Zuniga and on December 21, 1998, gave birth to Zuniga's son, JR Zuniga. However, on May 23, 1999, this child also died as a result of "shaken baby syndrome."[7] Again, mother was

[1] We note that Corilla's name is listed wrong on both docket sheets. Here, we have used the spelling provided in his brief on appeal.

[2] It appears that mother's parental rights were terminated under §§ 19b(3)(b)(i), (c)(i) and (j) whereas father's parental rights were terminated under §§ 19b(3)(b)(i), (j) and (k).

[3] Respondents' deceased child's name also began with a J; therefore, for ease of reference we will refer to the deceased child by "child."

[4] MCL 750.321; MSA 28.553

[5] At the time of trial, father anticipated being released from prison on December 21, 2000, the earliest possible release date. However, according to the Michigan Department of Corrections Offender Tracking Information System, father is still currently incarcerated. While it is possible that he could be released earlier, his maximum sentence will not be completed until February 3, 2009. In addition, father is not an American citizen and therefore is subject to deportation upon release from prison.

[6] The FIA withdrew the termination petition against mother based on evidence indicating that mother – at the time – was an appropriate parent. In addition, at the time the children were returned to mother, father was serving his involuntary manslaughter conviction.

[7] As a result of JR's death, Zuniga was charged with manslaughter. The record does not indicate the outcome of Zuniga's trial on the manslaughter charge. The record does indicate however, that Zuniga admitted to shaking JR.

not at home at the time of the incident and it was Zuniga who called the ambulance on behalf of JR. After this death, the FIA filed an initial petition in Allegan Circuit Court on May 21, 1999 alleging that mother physically abused her children and that two of her children had died from brain trauma associated with physical abuse. The petition also alleged that father was currently in prison serving an involuntary manslaughter conviction for the death of respondents' child.

In November 1999, the FIA prepared a parent-agency agreement for mother that required her, among other things, to (1) complete a psychological evaluation, (2) participate in counseling, (3) maintain stable employment and an appropriate home free of substance abuse or physical, sexual, or emotional abuse, (4) not engage in relationships with persons "deemed to be abusive" and (5) attend scheduled visitations with the children and demonstrate appropriate parenting skills with the children. The FIA did not prepare a parent-agency agreement for father because his imprisonment would not allow him to cooperate with such a plan. Thereafter, on August 28, 2000, the FIA filed a supplemental petition seeking termination of respondents' parental rights pursuant to MCL 712A.19b(3)(b)(i), (c)(i), (j) and (k); MSA 27.3178(598.19b)(3)(b)(i), (c)(i), (j) and (k). On October 2 and 3, 2000, a hearing was held before the family court regarding this supplemental petition. Based on the testimony and evidence presented at that hearing the family court found that petitioner had established clear and convincing evidence that termination was proper under subsections (3)(b)(i), (c)(i), (j) and (k) and also determined that termination was clearly not against the best interests of the children. Accordingly, the family court issued an order dated October 20, 2000, terminating respondents' parental rights.

II. Analysis

A. Court's Jurisdiction over Children

Mother challenges the trial court's assumption of jurisdiction over her children. Specifically, she contends that the trial court improperly accepted her plea of admission because the trial court should have recognized that she did not understand the consequences of her plea and therefore her plea was not knowingly made.

MCR 5.971 governs pleas of admission or no contest in child protective proceedings. Subsection (C)(1) of this rule provides:

> *Voluntary Plea*. The court shall not accept a plea of admission or of no contest without satisfying itself that the plea is knowingly, understandingly, and voluntarily made.

Here, mother admitted to allegations in the complaint that two of her children died of shaken baby syndrome while they were residing with her. She made these admissions after it was clarified that she was not admitting to being home at the time of the injuries. The trial court explained on the record that both respondents were waiving their right to a trial by making these admissions, and mother made no indication that she did not understand. Indeed, mother has never disputed that she lived with the children at the time of their deaths, although she has disputed the cause of their deaths. Therefore, mother maintains that the admissions she made – that two of her children died while residing with her – were not sufficient to warrant the trial court's assumption of jurisdiction over her children. We disagree.

To acquire jurisdiction in a child protection proceeding, the factfinder must determine by a preponderance of the evidence that the child comes within the statutory requirements of MCL 712A.2; MSA 27.3178(598.2). *In re Ramsey*, 229 Mich App 310, 314; 581 NW2d 291 (1998). The court cannot terminate a parent's rights pursuant to MCL 712A.19b(3)(b); MSA 27.3178(598.19b)(3)(b) unless jurisdiction exists under MCL 712A.2(b); MSA 27.3178(598.2)(b). *Id.* MCL 712A.2; MSA 27.3178(598.2) provides that the family court can assert jurisdiction over a minor:

> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in. [MCL 712A.2(b)(2); MSA 27.3178(598.2)(b)(2).]

There is no requirement that petitioner show culpable neglect on the part of the parent in order to establish jurisdiction. *In re Jacobs*, 433 Mich 24, 37; 444 NW2d 789 (1989); *In re Middleton*, 198 Mich App 197, 198; 497 NW2d 214 (1993).

In the instant case, the evidence indicated that mother twice lived with men who violently caused a baby's death. This evidence is sufficient to establish that her home is, by reason of cruelty, criminality and depravity, unfit for children. Mother's lack of culpability does not alter this fact. See *In re Brimer*, 191 Mich App 401; 478 NW2d 689 (1991) (holding jurisdiction properly asserted where mother's home was rendered unfit by her boyfriend's abuse of her daughter). Thus, the trial court properly asserted jurisdiction.

B. Sufficiency of the Evidence

Both respondents argue that the trial court erred in finding clear and convincing evidence to establish the statutory grounds for termination of their parental rights. We disagree. This Court's review of a trial court's factual findings in an order terminating parental rights is for clear error. MCL 5.974(I); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *In re Vasquez*, 199 Mich App 44, 51; 501 NW2d 231 (1993). A finding of fact is clearly erroneous if, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *In re Miller*, *supra*. Deference must be accorded to the trial court's assessment of the credibility of the witnesses before it. MCR 2.613(C); *In re Newman*, 189 Mich 61, 65; 472 NW2d 38 (1991). Once the trial court finds a statutory ground for termination by clear and convincing evidence, the court must terminate parental rights unless it finds, based on the whole record, that termination is clearly not in the best interests of the child. MCL 712A. 19b(5); MSA 27.3178(598.19b)(5); *In re Trejo Minors*, 462 Mich 341, 350; 612 NW2d 407 (2000); *In re Maynard*, 233 Mich App 438, 450-451; 592 NW2d 751 (1999).

Respondents' parental rights were terminated under MCL 712A.19b(3)(b)(i), (c)(i), (j) and (k); MSA 27.3198(598.19b)(3)(b)(i), (c)(i), (j) and (k), which provide as follows:

> (b) The child or sibling of the child has suffered physical injury or physical or sexual abuse under . . . the following circumstance[]:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds. . . the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

(iii) Battering, torture, or other severe physical abuse.

* * *

(v) Life threatening injury.

(vi) Murder or attempted murder.

Here, petitioner presented evidence that mother has lived with two men—first her husband, then her boyfriend—who each shook a baby to death. Petitioner established that these two occurrences were not merely a tragic coincidence, but causally connected to mother's psychological state which causes her to associate with violent men who endanger her children, a fact that was underscored by mother's testimony that she may reunite with father after he is released from prison and her continual failure to disassociate either from father or Zuniga. In addition, despite compelling, objective medical evidence, mother refused to acknowledge that father and Zuniga were responsible for the deaths of two of her children. Further, psychological evidence established that mother is dependent on men and unwilling to blame men or question their authority. Based on this evidence, it is clear that mother is unable to protect her children from harm. Thus, the trial court properly terminated mother's parental rights under § 19b(3)(j).[8]

[8] Mother also argues that the trial court impeded her efforts to demonstrate appropriate parenting skills by granting petitioner's motion to suspend visitation when she was not represented by (continued…)

With regard to father, petitioner established that father shook a sixteen-month old child to death and that he continues to deny responsibility for the death despite compelling circumstantial evidence that led to his manslaughter conviction. Accordingly, termination of father's parental rights under § 19b(3)(k) was proper.[9]

We also find that the family court's assessment of the best interests of the children was not clearly erroneous.[10] MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Trejo*, *supra*. The record reveals that respondents' children had been made temporary court wards on two separate occasions and that respondents have failed to provide the children with a stable, nurturing and protective home for the children. The record also establishes that mother still refuses to accept that two of her children died as a result of actions undertaken by father, her husband, and Zuniga, her boyfriend.[11] In addition, the records indicates that father was still in prison for his involuntary manslaughter conviction and still refuses to accept culpability in the death of his child. Further, the record reveals that both children have repeatedly stated they did not want to live with either parent out of fear of being abused and that there has been marked improvement in both children since they have been placed in foster care. Thus, based on the whole record, we are not left with the definite and firm conviction that termination was clearly not in the best interests of the children. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Miller*, *supra*; *In re Trejo*, *supra*; *In re Maynard*, *supra*.

C. Ineffective Assistance of Counsel

Mother also claims that she was denied the effective assistance of counsel. In child protective proceedings, the principles of effective assistance of counsel developed in the criminal

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(…continued)

counsel. Although respondent mother raises this argument as part of her sufficiency of the evidence issue, it actually is a separate issue challenging the trial court's decision on that motion. Appellate review of this issue is waived because respondent mother failed to include it in her statement of questions presented. Cf *In re Coe Trusts*, 233 Mich App 525, 536-537; 593 NW2d 190 (1999). In any event, there is no reasonable likelihood that the trial court would have ruled differently if respondent mother had been represented at that hearing, and the evidence does not support respondent mother's contention that continuation of visits could have led to a different outcome.

[9] Because the family court properly terminated mother's and father's parental rights under subsections 19b(3)(j) and (k), respectively, and only one statutory ground for termination must be established in order to terminate parental rights, we need not decide whether termination was also proper under subsections 19b(3)(b)(i) and (c)(i).

[10] Although mother does not challenge the best interest determination, father has properly preserved, raised and argued the issue. Accordingly, since we must address it with respect to the father and we are presented with the necessary facts to render a decision, we will address the best interest determination of the family court as to both respondents. See *Brown v Drake-Willock International, Ltd*, 209 Mich App 136, 146; 530 NW2d 510 (1995); *Spruytte v Owens*, 190 Mich App 127, 132; 475 NW2d 382 (1991).

[11] Again, we note that the record does not reveal whether Zuniga was convicted of the involuntary manslaughter charge against him; nonetheless, the record does reveal that he admitted to shaking the baby.

law context apply by analogy. *In re EP*, 234 Mich App 582, 598; 595 NW2d 167 (1999), rev'd on other grounds, *In re Trejo*, *supra*. To establish a claim of ineffective assistance of counsel, a respondent must show that counsel's performance fell below an objective standard of reasonableness and, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different, thus depriving the respondent of a fair trial. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Further, since mother failed to preserve this issue below by way of a motion for a new trial or *Ginther*[12] hearing, our review of this issue is limited to errors apparent on the record. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999).

Mother's ineffective assistance of counsel allegation is threefold; first she argues that her counsel erred by not moving for a rehearing of the adjudication. However, as discussed above, we find that the trial court properly asserted jurisdiction over the minors in this case. Thus, counsel did not err in failing to move for a rehearing. See *People v Flowers*, 222 Mich App 732, 737-738. Next, mother contends that her counsel was ineffective when he failed to move for a resumption of visitation rights. However, the record reveals that counsel requested the court for more visitation shortly after he was assigned to the case, but, by this time, petitioner had already filed the termination petition, which cut off all future visits. In addition, even though the court indicated that counsel could renew his request at a later date, given mother's history of having uncontrolled, disruptive conduct during previous visits, it is plausible that counsel's decision not to renew his request was sound trial strategy and we will not substitute our judgment for that of counsel regarding matters of trial strategy. See *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Mother also claims that her counsel was ineffective for failing to request a foreign language interpreter. However, the record reveals that the court unsuccessfully tried to locate a foreign language interpreter before counsel's involvement in this case and that the court had determined that mother was not in need of an interpreter. Thus, any request made by counsel would have been futile. *Flowers*, *supra*. Further, nothing in the record indicates that mother was prejudiced by the absence of an interpreter. Accordingly, the record does not reveal any error on the part of mother's counsel or how she may have been prejudiced by counsel's representation in this case. *In re Ayres*, *supra*; *Stanaway*, *supra*; See also *People v Carbin*, 463 Mich 590; 623 NW2d 884, 889 (2001); *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Consequently, we conclude that mother's ineffective assistance of counsel claim is without merit.

D. Res Judicata

Father argues that because the Ottawa Probate Court had already decided, on the same facts, to deny a petition to terminate his parental rights, the termination order in this case was barred by the doctrine of res judicata. Again, we disagree.

In order for a prior judgment to operate as a bar to a subsequent proceeding, three requirements must be satisfied: (1) the subject matter of the second action must be the same; (2) the parties or their privies must be the same; and (3) the prior judgment must have been on the merits. *In re Pardee*, 190 Mich App 243, 248; 475 NW2d 870 (1991); see also *Sewell v Clean*

[12] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Cut Management, Inc, 463 Mich 569, 575; 621 NW2d 222 (2001). In *In re Pardee*, *supra* at 248 this Court held that res judicata did not bar an order terminating a father's parental rights, even where the petitioner relied on facts that predated a prior order denying termination:

> While we agree with respondent that if these three requirements are met res judicata would operate as a bar to a second termination proceeding, we do not agree that the requirements were met in this case. Specifically, we conclude, on the basis of a thorough review of the record, that respondent has failed to establish that the subject matter of the first termination proceeding regarding his parental rights to the younger daughter was the same as that in the second proceeding.

The Court also emphasized that the unique concerns in termination cases militate against an overly rigid application of the doctrine:

> We recognize that respondent has a significant interest in protecting himself from repeated vexatious or unnecessary relitigation of issues which the doctrine of res judicata is designed to prevent. *People in Interest of JR* [711 P2d 701, 703 (Col App 1985).] Nevertheless, this doctrine cannot settle the question of a child's welfare for all time, nor prevent a court from determining at a subsequent time what is in the child's best interest at that time. *In re Interest of VB* [220 Neb 369, 371-372; 370 NW2d 119 (1985).] Moreover, res judicata should not be a bar to "fresh litigation" of issues that are appropriately the subject of periodic redetermination as is the case with termination proceedings where new acts and changed circumstances alter the status quo. [*In re Pardee*, *supra* at 248-249.]

Accordingly, the pertinent question here is whether the 2000 order terminating respondent father's parental rights is based entirely on facts the petitioner raised to support its claim in Ottawa County in 1995, or whether the 2000 order was also based on new circumstances or factors that did not enter into the Ottawa court's decision. Here, the family court determined that the present circumstances were different than the circumstances in 1997, and that termination was now warranted. In making this determination, the family court recognized that in the previous court case the court stated:

> We don't know what's going to happen four or five years from now, so the only way to keep from terminate [sic] rights, that's not going to keep them from getting back together, you'd have to get an order at the time if that's what they're planning on doing, so, in effect, why don't you wait until he gets out of prison to see what happens, maybe somebody'll [sic] change his [sic] mind by then, *so we're not going to terminate one parent rights over the other and just drop father out of having any responsibility legally for the financial welfare of the children*. [Emphasis added.]

This language indicates that the previous court denied the termination petition based, at least in part, on its unwillingness to relieve father of his support obligation while the children lived with mother and while he was incarcerated and thus unable to pose any immediate threat to the

children.[13] Here, father's persistent refusal to acknowledge his responsibility for child's death five years after the homicide is a new fact that establishes his unfitness as a parent. Additionally, mother's loss of her parental rights creates the new circumstance that respondent father could eventually acquire custody of his children and pose a threat to their well-being.[14] Further, because the trial court terminated mother's parental rights and since father's actual release date from prison is unknown, not terminating father's rights would result in an indefinite term of foster care for the children.[15] Accordingly, based on these new facts and circumstances not present in the previous termination proceedings, this termination proceeding was not res judicata. *In re Pardee*, *supra*.

III. Conclusion

Because the trial court found by clear and convincing evidence that the statutory grounds for termination were met as to both respondents, and since we find that termination was clearly not against the best interest of the children and that respondents' other claims regarding ineffective assistance of counsel and res judicata were without merit, we conclude that termination of respondents' parental rights was proper.

Affirmed.

/s/ Janet T. Neff
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder

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[13] It also appears that the Ottawa court left open the possibility that petitioner could revisit the issue of respondent father's fitness as a parent if he subsequently posed a risk to the children, for example, if he moved back in with mother after his release.

[14] In fact, while it did not occur, at the termination hearing father maintained that he would be released from jail on December 21, 2000, less than three months after the termination hearing was held. Therefore, it was possible that unlike the case in Ottawa Circuit, father could pose an immediate harm to the children.

[15] In addition, we note that once released from prison, father faces the possibility of deportation.