

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of RAYMOND WILLIS, JR.,
NATHAN BARDAZON, KAYLA ROSE SMITH,
and NICHOLAS RYAN BARDAZON, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

V

DAWN SMITH,

Respondent-Appellant.

UNPUBLISHED

January 15, 2002

No. 230787

Oakland Circuit Court

Family Division

LC No. 98-612973-NA

Before: Owens, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Respondent, biological mother of the involved minor children, appeals as of right from an order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i) and (g). We affirm.

Respondent first contends that the trial court erred in terminating her parental rights to her two older children because they were not in foster care, but instead resided in the care of their respective fathers. The issue whether a parent's rights to a child may be terminated pursuant to MCL 712A.19b(1) when the child is in the care of the other parent was addressed in *In re Marin*, 198 Mich App 560; 499 NW2d 400 (1993). This Court held that "the parental rights of one parent may be terminated without the termination of the parental rights of the other parent and it is not necessary that the child be in foster care in order for the termination petition to be entertained." *Id.* at 568. Therefore, we find that respondent's argument lacks merit.

Respondent also submits that the trial court should have applied MCR 5.974(E), rather than MCR 5.974(F), to its determination whether to terminate her parental rights to the two older children because they were not in foster care, and thus the only basis for the court's jurisdiction would be "one or more circumstances new or different from the offense that led the court to take jurisdiction" that is "sufficient to warrant termination of parental rights." MCR 5.974(E). According to respondent, the allegations in the supplemental petition concerned only such items as her compliance with the parent-agency agreement, whether she completed parenting classes,

and whether she benefited from the services offered to her, none of which involved a new circumstance or amounted to an independent ground for termination.

As noted in *In re Snyder*, 223 Mich App 85; 566 NW2d 18 (1997), the court rules distinguish between cases where the basis for taking jurisdiction is related to the basis for seeking termination of parental rights, and those cases where the basis for taking jurisdiction is unrelated to the basis for seeking termination of parental rights. *Id.* at 89. In the first situation, “legally admissible evidence (under the rules normally used in civil proceedings) will already have been adduced at the adjudicative-phase trial, and thus *supplemental* proofs, which are presented on a background of such legally admissible evidence, need not be admissible under the Michigan Rules of Evidence.” *Id.* at 89-90 (emphasis in original). However, “[i]n the second situation, the basis for terminating parental rights lacks this background of legally admissible evidence from the adjudicative phase and, thus, such a foundation must be laid before probative evidence not admissible under the Michigan Rules of Evidence may be considered. MCR 5.974(E)(1).” *Snyder, supra* at 90.

As reflected by this Court’s analysis in *Snyder*, the court rules are not meant to distinguish between whether or not children are in foster care at the time of the termination proceedings. The rules instead make a distinction on the basis of the grounds alleged for termination in a supplemental petition. MCR 5.974(F) applies where, as here, the court had placed the children with the other parent and the grounds for termination in the supplemental petition were related to the grounds in the initial petition.

Respondent next asserts that the petition should have been dismissed because the trial court did not hold a hearing within the time contemplated by MCR 5.974(F)(1)(b), and did not issue a decision within the time specified in MCR 5.974(G). These court rules provide no penalty or sanction for failing to meet the specified deadlines. This Court will not impose a sanction that the Legislature and the Supreme Court have declined to impose. *In re Jackson*, 199 Mich App 22, 28-29; 501 NW2d 182 (1993). We conclude that the trial court’s failure to adhere to these deadlines is not a sufficient basis for this Court to vacate the trial court’s decision. *In re DaBaja*, 191 Mich App 281, 287-288; 477 NW2d 148 (1991).

Respondent further claims that the trial court improperly barred evidence regarding her progress after the date that the supplemental petition was filed. A trial court’s decision to admit or exclude evidence is reviewed for an abuse of discretion. *Chmielewski v Xermac, Inc.*, 457 Mich 593, 614; 580 NW2d 817 (1998). While the court was free to receive and rely on any relevant evidence, MCR 5.974(F)(2), evidence relevant to the termination hearing constituted evidence that tended to prove the allegations in the petition seeking termination of respondent’s parental rights, MRE 401, which allegations all referred to respondent’s past behaviors. Therefore, we cannot conclude that the trial court abused its discretion in refusing to hear evidence of respondent’s progress after the filing date of the petition for termination.

We note that the trial court in its opinion and order stated, “The children have now been out of their mother’s care for seventeen months. During that period [respondent] has made minimal progress toward reaching the requirements of the Parent/Agency agreement.” While the court’s reference to seventeen months was inaccurate because only 13-1/2 months had passed between the court assuming jurisdiction over the children and the filing of a petition requesting

termination of respondent's parental rights, the factual evidence cited by the court all referred to the relevant 13-1/2 month time period. Accordingly, we find the court's misstatement harmless.

Respondent also contends that the trial court clearly erred in finding that the statutory grounds for termination were supported by clear and convincing evidence. MCR 5.974(I). The court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(c)(i) and (g). Respondent pleaded no contest to the allegations of neglect in the original petition, which were sufficient to show that respondent without regard to intent failed to provide the children proper care and custody. Furthermore, respondent failed to substantially comply with the parent-agency agreements. She did not complete parenting classes or participate in therapy, domestic violence programs, or drug and alcohol evaluations. Respondent inconsistently attended visitations with the two younger children, and did not always conduct herself appropriately during visits. Respondent had lived in five different residences during the year between the filing of the initial petition and the supplemental petition. Respondent's instability and her refusal to comply with services demonstrate that she would not be able to provide the children proper care and custody within a reasonable period of time. The same evidence also establishes that respondent failed to rectify the conditions that led to adjudication, and would not be able to do so within a reasonable period of time. Consequently, we conclude that the trial court did not clearly err in finding these statutory grounds established by clear and convincing evidence.

Lastly, respondent argues that the trial court erred in its evaluation of the children's best interests. We agree that the court erred when it stated that the burden of going forward with evidence that termination was clearly not in the children's best interests rested with respondent. As our Supreme Court determined in *In re Trejo Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000), MCL 712A.19b(5) does not specify that the parent carries the burden of producing best interests evidence opposing termination. Although the trial court misstated that respondent had the burden of producing best interests evidence, the court nonetheless reviewed and considered all the evidence presented. Viewing the evidence on the whole record, the court did not clearly err in finding that termination of respondent's parental rights was not contrary to the children's best interests. As the trial court found, respondent had no plan to provide financially for the two younger children without the assistance of her fiancé, who had never even met the children. Respondent also failed to complete the parent-agency agreement and was not presently prepared to assume parental responsibility for the children, who could not wait indefinitely for their mother.

Respondent complains that the court did not mention the court-ordered psychologist's report or follow the psychologist's recommendation. In its written findings, however, the court summarized the psychologist's testimony at length and acknowledged the psychologist's recommendation that respondent's parental rights not be terminated until she received additional time to complete the parent-agency agreement. As the court noted, the psychologist did not recommend returning the children to respondent until after she made significant progress in therapy and maintained a consistent home environment for an extended period of time. In light of respondent's failure to complete the parent-agency agreement requirements during the approximately twenty-month period of time that had passed since the case began, the court found that respondent was not presently prepared to assume responsibility for raising the four young

and that it was not in the children's best interests to wait an indefinitely long period of time for permanent placement.

Affirmed.

/s/ Donald S. Owens

/s/ Donald E. Holbrook, Jr.

/s/ Hilda R. Gage