

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of M.M., B.M. and D.H., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

SHANNON MUSU,

Respondent-Appellant.

UNPUBLISHED

June 21, 2002

No. 231800

Washtenaw Circuit Court

Family Division

LC No. 99-024810-NA

In the Matter of B.M. and M.M., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ROBERT MUSU,

Respondent-Appellant.

No. 231805

Washtenaw Circuit Court

Family Division

LC No. 99-024810-NA

Before: Owens, P.J., and Sawyer and Cooper, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the order terminating their parental rights to the minor children. Respondent mother's parental rights were terminated pursuant to MCL 712A.19b(3)(c)(i) and (g). Respondent father's parental rights were terminated pursuant to MCL 712A.19b(3)(c)(i), (g) and (h). We affirm.

Generally, we review decisions terminating parental rights for clear error. *In re Trejo*, 462 Mich 341, 356; 612 NW2d 407 (2001). The *Trejo* Court explained that a clearly erroneous decision “must strike us as more than just maybe or probably wrong” *Id.*, quoting *In re*

Sours, 459 Mich 624, 633; 593 NW2d 520 (1999). This standard applies to our review of both a trial court's decision regarding the establishment of a statutory ground for termination by clear and convincing evidence, as well as a decision regarding the best interests of the child. *In re Trejo*, *supra* at 356-357.

Respondent mother contends that the trial court erred in terminating her parental rights pursuant to MCL 712A.19b(3)(c)(i). We agree.

Here, the initial dispositional order regarding the mother was issued on December 12, 1999. The petition to terminate the mother's parental rights was filed on January 15, 2000, a mere thirty-four days later. MCL 712A.19b(3)(c)(i) permits termination only if "182 or more days have elapsed since the issuance of an initial dispositional order" The clear intent of the statute is to give a parent at least 182 days to rectify the conditions that led to the adjudication. Since the mother was only given thirty-four days, not the required minimum of 182 days, her rights could not be terminated pursuant to MCL 712A.19b(3)(c)(i).

We recognize that the statute provides that the 182 days is to be measured from the issuance of "an" initial dispositional order, and that, in this case, there were three "initial" dispositional orders entered: one concerning the father of D.H.; one concerning the father of B.M. and M.M.; and one concerning the mother of all three children. However, even if the statute could be interpreted as beginning the running of the 182 days as to the mother from the earliest "initial" dispositional order, the statute was still not complied with in this case. With regard to B.M. and M.M., the initial dispositional order regarding their father was issued November 3, 1999, seventy-three days before the filing of the petition to terminate the mother's rights. The initial dispositional order with regard to D.H.'s father was issued July 19, 1999, 180 days prior to the filing of the petition to terminate the mother's parental rights. Even if the 182 days could be measured from these earlier orders with regard to the mother's rights, both occurred less than 182 days prior to the filing of the petition to terminate the mother's rights.¹ Therefore, even if the 182 days could be measured with regard to the mother's rights from the date of the "initial" dispositional orders regarding the fathers, 182 days have not elapsed.² Consequently, the trial court erred by finding that respondent mother's parental rights could be terminated based on MCL 712A.19b(3)(c)(i).

However, we do not believe that the trial court clearly erred by terminating respondent mother's parental rights pursuant to MCL 712A.19b(3)(g). *In re Trejo*, *supra* at 356-357. In regard to respondent mother's claim that the trial court improperly terminated her parental rights on the basis that she would never be able to avoid relationships with abusive men, we note that the trial court terminated respondent mother's parental rights because the evidence showed that she had a serious drug problem and criminal propensities, that she had not remedied these

¹ We note that on the date (July 19, 1999) the court issued the initial order of disposition concerning D.H.'s father, the judge added the words "nunc pro tunc 6-4-99." That is that date the dispositional hearing was held regarding that child's father. However, there is nothing in the very confusing trial court record to indicate that the order qualified for issuance nunc pro tunc.

² Of course, the 182 days started running as to each father from the date of the "initial" dispositional order concerning that father.

problems during the course of these proceedings, that she was incarcerated, and that she was unable to properly care for the children. Thus, contrary to respondent mother's contention, termination was not because of any indication that she would be unable to avoid relationships with abusive men. Therefore, respondent mother's claim must fail on its premise.

Additionally, we reject respondent mother's claim that reasonable efforts were not made to rectify the conditions that caused the removal of the children from her home. Initially, we note that respondent mother forfeited this issue by failing to raise it below. *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000). Regardless, the juvenile code requires only that petitioner offer services that will facilitate reunification and any additional services the court may order. See MCL 712A.18f; MCL 712A.19. It does not require that petitioner offer every conceivable service that is available before termination may be ordered. In this case, during much of the time the children were in foster care, respondent mother was either incarcerated or a fugitive from justice. Therefore, it was difficult for petitioner to offer respondent mother services. In spite of the difficulties, however, petitioner did offer services to respondent mother and her family. Moreover, respondent mother does not specify on appeal what additional services petitioner should have offered, or could have offered while she was incarcerated or on the run from the law. For these reasons, respondent mother is not entitled to relief on her claim of inadequate services.

Respondent father contends that his right to due process was violated when the trial court failed to secure his release from prison so that he could attend the continued termination hearing on April 11, 2000, and some of the review hearings in this matter.³ We have held that an incarcerated respondent has no absolute right to attend a termination hearing. *In re Vasquez*, 199 Mich App 44, 48; 501 NW2d 231 (1993). Instead, the trial court should apply the three-part balancing test of *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 LEd2d 18 (1976). Under this test, the trial court must balance:

[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*In re Render*, 145 Mich App 344, 348-349; 377 NW2d 421 (1985), quoting *Mathews*, *supra* at 335.]

Here, these factors weighed in favor of holding the hearing despite respondent father's absence. There is no dispute that the trial court attempted to secure respondent father's presence at the continued termination hearing by issuing a writ and forwarding it to the county jail. However, between the earlier hearing and the continued hearing, respondent father had been relocated from the jail to an unknown prison facility and, apparently, the writ issued by the trial

³ It should be noted that respondent father does not challenge the trial court's finding that statutory grounds for terminating his parental rights were established by clear and convincing evidence.

court had not been forwarded to respondent father's new facility. Thus, the trial court did, in fact, attempt to secure respondent father's presence at the continued termination hearing.

Additionally, respondent father has not shown that he was prejudiced by his inability to attend the continued termination hearing held on April 11, 2000. Petitioner's witnesses, respondent father, and respondent mother all testified at the earlier portion of the termination hearing, which was held on March 1, 2000. At the April 11 hearing, respondent mother was subjected to cross-examination and FIA caseworker Lori Ann Wright was called to the witness stand by counsel for respondent mother. Respondent father's attorney cross-examined Wright and elicited testimony favorable to respondent father regarding the bond between respondent father and the children. The hearing was then adjourned to May 23, 2000, to give respondent father the opportunity to present additional evidence or to cross-examine respondent mother or FIA caseworker Lori Ann Wright. However, even though he was given the opportunity to do so, respondent father did not present any evidence during the May 23 hearing. As such, it appears that respondent father was given every opportunity to testify, to present evidence and witnesses favorable to his case, and to cross-examine witnesses and contradict evidence presented by the FIA. Accordingly, respondent father has not shown that he was prejudiced by his absence from the April 11 hearing. Therefore, his due process claim must fail.

Next, respondent father claims that his due process rights were violated because he was not "writted out" for some of the review hearings. However, respondent father has not even alleged, much less shown, that he was prejudiced by his absence from these hearings. He does not claim that any of the information provided at the review hearings was inaccurate or that he would have disputed any of the information if he had been present. Moreover, he does not indicate what, if any, relevant information he would have provided at these hearings if he had been present. Again, we cannot conclude that respondent father has shown that he was prejudiced by his absence from these review hearings. We will not reverse an otherwise proper termination absent a showing that a party suffered an actual deprivation of an important right. *In re Osborne*, 459 Mich 360, 369 n 10; 589 NW2d 763 (1999).

Respondent father also claims that his due process rights were violated by his attorney's absence from the preliminary hearing held on July 9, 1999. However, a review of the preliminary hearing transcript reveals that respondent father agreed to proceed with the preliminary hearing in the absence of his attorney. In fact, it was respondent father's suggestion that the trial judge proceed with the hearing in the absence of his attorney. Therefore, respondent father is precluded from claiming on appeal that the trial court erred in proceeding with the hearing in the absence of his attorney. "[A] party cannot request a certain action of the trial court and then argue on appeal that the action was error." *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Regardless, respondent father has not shown that he was prejudiced by his attorney's absence at the preliminary hearing. In fact, respondent father does not even assert that he was prejudiced. Accordingly, reversal is not warranted. *Osborne*, *supra* at 369 n 10.

Respondents both claim that because respondent mother placed the children with their maternal great-grandmother prior to her incarceration in December 1998, the children were not without proper custody under MCL 712A.2(b)(1) and, therefore, the trial court did not have jurisdiction over the children. This argument, however, is an improper collateral attack of the trial court's exercise of its jurisdiction. Unlike subject-matter jurisdiction, which may be raised at any time, a trial court's decision to exercise jurisdiction over a particular child can only be

challenged on direct appeal, not by collateral attack. *In re Powers*, 208 Mich App 582, 587-588; 528 NW2d 799 (1995). Thus, a respondent may not challenge the court's order assuming jurisdiction over the child in an appeal from the order terminating parental rights because the court's decision to assume jurisdiction was required to be separately appealed at an earlier point in the proceedings.⁴ *Id.* Here, respondents never challenged the trial court's adjudication that the children came within the court's jurisdiction or requested a rehearing on that issue. Accordingly, they may no longer challenge the trial court's exercise of jurisdiction. *Id.* at 588.

Finally, we reject respondents' claim that the trial court did not comply with the notification requirements of the Indian Child Welfare Act (ICWA). We review de novo, as a legal question of statutory interpretation, whether the trial court failed to satisfy the ICWA. *In re NEGP*, 245 Mich App 126, 130; 626 NW2d 921 (2001). In *In re NEGP*, we explained:

The ICWA sets forth specific procedures and standards for child custody proceedings involving foster care placement of or termination of parental rights to an Indian child.⁵ One of the ICWA's requirements is that an interested Indian tribe 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 in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. [*Id.*, at 130, quoting 25 USC 1912(a).]

Failing to comply with the ICWA requirements may render invalid a proceeding terminating a parent's rights." *In re NEGP*, *supra* at 131.

"However, the ICWA does not apply to proceedings where the child involved is not an 'Indian child.'" *In re NEGP*, *supra* at 133. Whether a child qualifies as an "Indian child" is not based entirely on enrollment in an Indian tribe because not all tribes maintain written membership rolls. See *id.*; Jones, 136, citing Guidelines for State Courts: Indian Child Custody

⁴ Unless, of course, the termination of parental rights occurred at the initial dispositional hearing. See MCR 5.993(A).

⁵ "For purposes of the ICWA, an 'Indian child' is any unmarried individual less than eighteen years of age who is either (1) an Indian tribe member or (2) both eligible for Indian tribe membership and an Indian tribe member's biological child." *In re NEGP*, *supra* at 131, citing 25 USC 1903(4). We note that "Indian tribe" does not include all Indian tribes, but only those that are federally "recognized." 25 USC 1903(8). Thus, Indian tribes which are recognized by a state, but not the federal government, and Canadian tribes are not considered "Indian tribes" for the purposes of the ICWA. See Jones, The Indian Child Welfare Act Handbook, p 17.

Proceedings, 44 Fed Reg 67593, § B.1 (1979). “Rather, the question whether a person is a member of a tribe is for the tribe itself to answer.” *In re NEGP*, *supra* at 133

Here, petitioner provided the U.S. Department of Interior, Bureau of Indian Affairs (BIA), and certain tribes (Creek, Osage, Cherokee and Seminole) notice of these proceedings by certified mail, return receipt requested. The BIA responded by indicating that it was “[u]nable to identify tribal affiliation of [the] children.” The tribes responded by indicating that the children were not eligible for membership. The notices provided by petitioner were sufficient to comply with the ICWA notice requirements. *In re TM (After Remand)*, 245 Mich App 181, 187-188; 628 NW2d 570 (2001).

Contrary to respondents’ claim, the fact that petitioner did not notify the BIA or the tribes with which respondent mother claimed an affiliation until after the termination order was entered does not require automatic reversal of the termination order. *In re IEM*, 233 Mich App 438, 450; 592 NW2d 751 (1999). Because the required notice was provided to the Indian tribes, all of which declined to intervene, it was respondents’ burden to show that the ICWA still applied. *In re TM*, *supra* at 187. Respondents never formally objected to the determinations made by the Indian tribes or took any further action to show that the ICWA applied. Therefore, there has been no showing that the children were Indian children as defined in the ICWA. Thus, any error in providing late notice to the BIA and the allegedly interested tribes was harmless. Respondents have not shown that they were actually deprived of an important right. Under these circumstances, we will not reverse the termination order. *In re Osborne*, *supra* at 369 n 10.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jessica R. Cooper