STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ANEISHKA PADILLA, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

SUSANNA ESTRELLA,

Respondent-Appellant.

UNPUBLISHED
November 15, 2007

No. 278134
Clinton Circuit Court
Family Division
LC No. 06-018651-NA

In the Matter of ANEISHKA PADILLA, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ISRAEL PADILLA MELENDEZ,

Respondent-Appellant.

No. 278135
Clinton Circuit Court
Family Division
LC No. 06-018651-NA

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIUM.

Respondents Susanna Estrella (hereinafter "respondent-mother") and Israel Padilla Melendez (hereinafter "respondent-father") each appeal as of right from the trial court's order terminating their parental rights to the minor child under MCL 712A.19b(3)(a)(ii), (c)(i), (c)(ii), (g), (j), and (n)(ii).[1] We affirm.

[1] Only respondent-father's parental rights were terminated under subsections (3)(a)(*ii*) and (3)(n)(*ii*).

The child was initially removed from respondent-mother's custody in February 2006, after the child was left with a neighbor and respondent-mother was unable to pick up the child because she had been arrested for driving while intoxicated and assaulting a police officer. Respondent-father resides in Minnesota, where he was on parole after serving a prison term for an assault conviction arising from a brutal stabbing assault against respondent-mother while the family lived there.

The trial court terminated respondent-mother's parental rights because of her continued abuse of drugs and alcohol, for which she was incarcerated more than once, and because she continued to engage in abusive relationships, which placed the child at risk of harm or neglect. Although respondent-mother participated in services, the court found that she did not sufficiently benefit from those services. In particular, she did not make any progress in addressing her alcohol abuse until shortly before the termination hearing.

Respondent-father's parental rights were terminated because he had not had any contact with the child, did not seek custody, and never responded to petitioner's notice of these proceedings.

Respondent-mother first argues that her right to due process was violated because an interpreter was not consistently provided to assist her in communicating with her caseworker. Because respondent-mother never argued below that the language barriers in this case infringed on her right to due process, this issue is not preserved. *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 538; 669 NW2d 594 (2003). This Court reviews unpreserved constitutional issues for plain error affecting substantial rights. See *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 606; 603 NW2d 824 (1999).

Under the federal constitution, a person may not be deprived of life, liberty, or property, without due process of law. *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 605-606; 683 NW2d 759 (2004); US Const, Am XIV. "Parents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003).

Respondent-mother's argument implicates procedural due process. The analysis of a procedural due process argument

> "requires a dual inquiry: (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient." *Jordan v Jarvis*, 200 Mich App 445, 448; 505 NW2d 279 (1993). [*Hinky Dinky*, *supra* at 606.]

Due process is a flexible concept, the essence of which is to ensure fundamental fairness. *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005).

Termination cases, however, include greater due process requirements. *In re Vasquez*, 199 Mich App 44, 46; 501 NW2d 231 (1993). This Court should apply a balancing test to determine (1) "the private interest at stake," (2) "the incremental risk of an erroneous deprivation

thereof in the absence of the procedure demanded," and (3) "the government's interest in avoiding the burden the procedure would carry." *Id*. at 47.

The failure to appoint an interpreter when a criminal defendant does not understand and speak English can violate the Due Process and Confrontation Clauses of the Fifth, Sixth, and Fourteenth Amendments of the federal constitution, US Const Ams V, VI and XIV. See *Rubio v Estelle,* 689 F2d 533, 535 (CA 5, 1982); *United States v Carrion,* 488 F2d 12, 13-14 (CA 1, 1973); *Mariscal v State,* 687 NE2d 378, 382 (Ind App, 1997). See also *People v Cunningham,* 215 Mich App 652, 657; 546 NW2d 715 (1996) (a defendant's right to due process includes the translation of each question and answer and inadequate translation of testimony can deny a defendant his constitutional right to confront the witnesses against him).

Because this is a civil proceeding, the Sixth Amendment does not apply. However, the use of an interpreter to overcome a language barrier may be required as an element of due process under the Fourteenth Amendment. See *Esteves v Esteves,* 680 A2d 398, 405-406 (DC App, 1996) (the plaintiff was not deprived of the right to due process because the trial court failed to inquire whether she required an interpreter when the record indicated that she could communicate in English, although with some difficulty); *Yellen v Baez,* 177 Misc 2d 332, 333-336; 676 NYS2d 724 (1997) (the failure to appoint a qualified interpreter was a denial of due process under both the federal constitution and New York's state constitution).

Initially, given the private interest at stake, we agree that assistance of an interpreter was appropriate because of the language barrier in this case. Further, given the interest at stake, it was not a significant burden on petitioner to provide respondent-mother with an interpreter or otherwise make accommodations to address the language barrier. Nonetheless, we are satisfied from the record that any language barrier was not so significant in this case that there was any incremental risk of an erroneous deprivation of respondent-mother's parental rights because an interpreter was not available during every encounter between respondent-mother and her caseworker or a service provider.

There clearly was no due process violation during the court hearings. An interpreter was provided at all but two hearings. At the two hearings where an interpreter was not available, respondent-mother voluntarily agreed to proceed without an interpreter, provided the witnesses talked slowly so she could understand.

Respondent-mother principally argues that she was denied due process because an interpreter was not available at all meetings with her caseworker. The trial court did not order petitioner to provide an interpreter at all meetings, but only to provide assistance as required to address the language barrier. We believe this standard was satisfied.

An interpreter was provided for the first meeting between respondent-appellant and the caseworker. According to the caseworker, however, they were generally able to communicate without the aid of an interpreter. When services were available in Spanish, the caseworker attempted to make referrals for those services. Respondent-mother was initially living in a community that did not have a large Hispanic population, however, and it was not until she moved to Lansing that she was able to fully take advantage of all of these services. Before then, respondent-mother voluntarily chose to remain with her English-speaking therapist instead of going to a therapist who was fluent in Spanish.

It appears that the language barrier contributed to a problem with housing. However, that situation was not so much attributable to the caseworker's inability to converse in Spanish, but to respondent-mother's failure to seek assistance after she mistakenly gave her landlord notice that she was vacating her apartment. At that time, her counselor at Cristo Rey, who was fluent in Spanish, was helping respondent-mother review any letters she received, including the one about her housing assistance. Respondent-mother apparently mistakenly read the letter on her own and failed to timely seek assistance to understand the letter before she acted. It is unclear how an interpreter could have helped avoid that situation.

When respondent-mother began acting incoherently after her visits were switched to supervised visits, the caseworker obtained help from a coworker who was able to converse with respondent-mother in Spanish to calm her down and obtain immediate help for her condition.

Finally, we find no merit to respondent-mother's assertion that the language barrier prevented her from knowing what she was required to do to comply with her case service plan and be reunited with her child. The trial court primarily relied on respondent-mother's failure to resolve her history of substance abuse and domestic violence in terminating her parental rights. Respondent-mother testified that she sought out substance abuse treatment and psychological help on her own, without the caseworker's assistance, and knew that she was required to remain sober. She also knew that she was supposed to stay away from her abusive boyfriend.

For these reasons, the absence of an interpreter on some occasions did not deprive respondent-mother of her right to due process.

Respondent-mother also relies on *In re JK*, *supra* at 210, in which our Supreme Court stated that "[a] due-process violation occurs when a state-required breakup of a natural family is founded solely on a 'best interests' analysis that is not supported by the requisite proof of parental unfitness." To the extent that respondent-mother relies on *In re JK* to argue that the trial court did not base its decision on her unfitness as a parent, this argument lacks merit. The trial court evaluated respondent-mother's fitness as a parent by considering the statutory grounds for termination before considering the child's best interests.

Further, we disagree with respondent-mother's argument that the statutory grounds for termination were not proven by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). We review the trial court's findings of fact under the clearly erroneous standard. MCR 3.977(J). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Deference must be accorded to the trial court's assessment of the credibility of the witnesses before it. *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991).

The underlying problems that caused the child's removal, respondent-mother's substance abuse and involvement in abusive relationships, were not adequately resolved through treatment. The trial court found that, despite participating in services, respondent-mother had not benefited because she continued to see her abusive boyfriend, allowed the child to see him, and continued to abuse substances. The child was placed in foster care in February 2006, and respondent-mother did not begin to recognize that her drinking was a problem until April 2007. Only then did she begin to attend AA meetings, but then attended them for only one month. The trial court

did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence.

Respondent-father's only argument on appeal is that petitioner failed to comply with MCL 712A.13a(10) and MCL 722.954a(2) when the child was initially placed in a foster home rather than with a relative. Because respondent-father did not raise this issue below, it is not preserved. Therefore, our review is limited to plain error affecting his substantial rights. *In re Osborne, supra*.

In this case, no plain error is apparent. The record discloses that petitioner investigated the possibility of relative placement, and that no relative came forward and offered to care for the child. Although respondent-father's mother had expressed an interest in caring for the child, she admittedly never followed through and did not request that a home study be performed, instead opting to wait and allow respondent-mother to try and obtain custody.

Respondent-father also appeared to offer his mother as a caregiver for the child in lieu of terminating his parental rights. A court has discretion to place a child with a relative instead of terminating a respondent's parental rights if it is in the child's best interests. *In re IEM*, 233 Mich App 438, 453; 592 NW2d 751 (1999); *In re McIntyre*, 192 Mich App 47, 52; 480 NW2d 293 (1991). Although respondent-father's mother testified at the termination hearing that she was willing to accept custody of the child, there was no basis for concluding that the child's best interests would be served by preserving respondent-father's parental rights considering his criminal history, his violent assault of respondent-mother in the child's presence, and the absence of a relationship between respondent-father and the child. See *In re IEM, supra* at 454. The trial court did not err in terminating respondent-father's parental rights to the child.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly