

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of SARAH JEAN MYERS and
JOSHUA JAMES MYERS, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KIMBERLY MYERS and JEFFREY MYERS,

Respondents-Appellants.

UNPUBLISHED

June 25, 1999

Nos. 213965; 215893

Oakland Circuit Court

Family Division

LC No. 93-057156 NA

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

Respondents Jeffrey Myers and Kimberly Myers appeal as of right from a family court order terminating their parental rights to the minor children, Joshua James Myers and Sarah Jean Myers. The court terminated respondents' parental rights pursuant to MCL 712A.19b(3)(c)(i) and (g); MSA 27.3178(598.19b)(3)(c)(i) and (g), as to Joshua, and pursuant to MCL 712A.19b(3)(g) and (j); MSA 27.3178(598.19b)(3)(g) and (j), as to Sarah. We affirm.

I

The trial court did not clearly err in finding, with respect to both respondents, that the statutory grounds for termination were established by clear and convincing evidence. MCR 5.974(I); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Further, because both respondents failed to demonstrate that termination of their parental rights was clearly not in the children's best interests, the court did not err in terminating their parental rights to the children. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Hall-Smith*, 222 Mich App 470, 472; 564 NW2d 156 (1997).

II

Additionally, respondent Kimberly Myers argues that the trial court abused its discretion by refusing to hold separate hearings regarding the termination of her parental rights to each of the two children. We disagree.

The decision whether to hold separate trials is reviewed for an abuse of discretion. *LeGendre v Monroe County*, ___ Mich App ___; ___ NW2d ___ (Docket No. 194647, issued 4/2/99) slip op p 5. The decision to sever should be ordered only on the most persuasive showing that the convenience of all parties and the court requires it. *Id.*, slip op at 5-6.

On the first day scheduled for the termination hearing concerning the supplemental petition seeking termination of respondents' parental rights to Joshua, the trial court decided that it would conduct Joshua's termination hearing pursuant to MCR 5.974(E) because the supplemental petition alleged "one or more circumstances new or different from the offense that led the court to take jurisdiction" and Joshua was not in foster care at the time. Therefore, pursuant to MCR 5.974(E)(1), the trial court held that only legally admissible evidence could be used to establish respondents' unfitness as to Joshua. The trial court conducted the termination hearing concerning Sarah pursuant to MCR 5.974(F), which applies where "the parental rights of the respondent over the child are not terminated at the initial dispositional hearing, and the child is in foster care in the temporary custody of the court." According to MCR 5.974(F)(1), "all relevant and material evidence" could be used to establish respondents' unfitness as to Sarah.

Subsequent to the trial court's decision regarding the admission of evidence concerning Joshua's petition, respondents both argued that the trial court should hold separate, or at least bifurcated, hearings regarding termination of their parental rights to the children because of the differing standards regarding admission of evidence. However, the trial court disagreed. It decided to hold one termination hearing, but assured the parties that it would "have the testimony as to one petition and then the testimony as to the other . . . [f]ollowing contemporaneously." Later, the trial court clarified that it would allow separate "questions of each witness as they may relate to Sarah and as they may relate to Joshua" and assured the parties that it would "keep two sets of notes, one will have Sarah on top and one will have Joshua on top. They will be separated and there will be questions that the witnesses are asked contemporaneously."

On appeal, Kimberly Myers argues that the trial court should have held two separate termination hearings on each termination petition. However, her arguments are meritless. At base, she asserts that the standards of proof regarding the separate petitions were different. She contends that, as to Sarah's petition, petitioner was required to prove parental unfitness by a preponderance of the evidence, while, regarding Joshua, it was required to prove parental unfitness by clear and convincing evidence. Actually, the standards of proof were identical. With regard to both children, petitioner was required to establish a statutory ground for termination by clear and convincing evidence. MCR 5.974(E)(1) and (F)(3). Kimberly Myers also argues that her attorney "must have been unable to

determine if an objection as to relevancy was proper where he would not be aware of which testimony was being offered for which petition” However, contrary to her argument, most of the evidence was relevant to both children. There is no further indication that the trial court’s decision to hold a joint hearing on termination of parental rights resulted in confusion or error. The trial court did not abuse its discretion by denying Kimberly Myers’ motion to hold separate hearings.

III

Respondent Jeffrey Myers argues that this Court should reverse the order terminating his parental rights on the basis that he received ineffective assistance of counsel at trial. He claims his attorney failed to offer testimony to explain some of the “contradictory testimony regarding his compliance with the parent agency agreement, his employment history, and the fact that he owned the home the children had resided in until their removal on January 15, 1998.” We disagree.

An indigent parent involved in a hearing which may terminate his parental rights is entitled to appointed counsel. MCR 5.915(B)(1). The right to counsel includes the right to competent counsel. In analyzing claims of ineffective assistance of counsel at termination hearings, this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988).

Effective assistance of counsel is presumed; a criminal defendant and, by analogy, a respondent in a termination of parental rights case, bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To establish ineffective assistance of counsel, a respondent must show (1) that counsel’s failure fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, notwithstanding counsel’s error, the result of the proceedings would have been different, and (3) that the result of the proceedings was fundamentally unfair or unreliable. *Id.*, 687-688. Because Jeffrey Myers did not move in the trial court for a new trial or an evidentiary hearing on the basis that he received ineffective assistance of counsel, our review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Reviewing the record, we conclude that counsel’s decision not to call witnesses was a matter of trial strategy. See *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Moreover, there is no indication from the record that trial counsel’s strategic decisions deprived Jeffrey Myers of a substantial defense. See *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). There is no indication that additional witnesses or evidence would have swayed the trial court’s decision to terminate Jeffrey Myers’ parental rights, in light of the ample evidence of his unsuitability as a parent.

IV

Finally, Jeffrey Myers argues that his Fourteenth Amendment right to due process was violated when the trial court failed to obtain his presence in the courtroom during a portion of the best interests hearing. We disagree.

Although respondent failed to raise this issue in the trial court, we will review an unpreserved allegation of constitutional error to determine whether it was decisive of the outcome. *People v Shively*, 230 Mich App 626, 629; 584 NW2d 740 (1998). Whether a person's due process rights have been violated is a question of law that we review de novo on appeal. *People v Walker*, ___ Mich App ___; ___ NW2d ___ (Docket No. 203630, issued 3/2/99), slip op at 2.

A parent has no absolute right to be physically present at a proceeding to terminate parental rights. *In re Vasquez*, 199 Mich App 44, 48-49; 501 NW2d 231 (1993). To determine whether due process requires a parent's physical presence at a parental rights termination hearing, this Court applies the balancing test set forth in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976), and balances the private interest at stake, the incremental risk of an erroneous determination in the absence of the parent's physical presence, and the government's interest in avoiding the burden of physically producing the parent for the termination hearing. *Vasquez, supra* at 47-48.

Applying this test, we conclude that the trial court's failure to require Jeffrey Myers' physical presence at the first portion of the best interests hearing did not violate due process. Undeniably, Jeffrey Myers' interest in his parental rights to his children was a compelling one. *Vasquez, supra* at 48. Moreover, because it appears that Jeffrey Myers was present in the courthouse and just had not been brought physically to the courtroom by the time the best interests hearing commenced, the financial and administrative burden on the government in order to bring Myers into the courtroom was negligible.

However, Myers' absence from the first portion of the best interests hearing did not increase the risk of an erroneous deprivation of his parental rights. Myers was represented by his lawyer during the entire best interests hearing and was physically present in the courtroom during the portion of the testimony that pertained exclusively to the children's best interests in relation to him. In light of Myers' ultimate admission that he was unable to provide for his family, and the evidence adduced at trial, which showed that Myers failed to address his problems with alcohol and violence, there is little chance that his physical presence at his lawyer's side during the first portion of the best interests hearing would have changed the result of the hearing. See *Vasquez, supra*. Accordingly, Jeffrey Myers has failed to show that the trial court's failure to obtain his physical presence during a portion of the best interests hearing violated his right to due process.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Jeffrey G. Collins