STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SMJ, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

V

THERESA JONES,

Respondent-Appellant,

and

JACKIE WILLOUGHBY,

Respondent.

UNPUBLISHED
December 21, 2001

No. 223785
Washtenaw Circuit Court
Family Division
LC No. 97-024553-NA

AFTER REMAND

Before: O'Connell, P.J., and White and Smolenski, JJ.

PER CURIAM.

Respondent-mother appeals as of right from the order terminating her parental rights to the minor child, SMJ (dob 2/18/97), under MCL 712A.19b(3)(c)(i), (g) and (j). After her rights were terminated, this Court granted respondent-mother's motion to remand to enable her to file "a motion for an evidentiary hearing for development of a factual record regarding the minor child's diagnosis of autism." The transcript of that hearing is before us, as are the parties' supplemental briefs filed after remand. We affirm.

Respondent-mother (respondent)[1] was in her late 20s when she had SMJ. Respondent has cognitive disabilities. In April 1997, her full-scale IQ was tested at 68.[2] She read at about a ninth grade level, but her comprehension was around the third-grade level. SMJ was

[1] Respondent-father voluntarily released his parental rights and is not a party to this appeal.

[2] There was testimony at the termination hearing that the first psychological evaluation performed of respondent was in April 1997, and that the FIA performed a second evaluation in May 1997.

respondent's first child. Shortly before SMJ's birth on February 18, 1997, respondent moved in with her mother, with whom respondent's brother, and her mother's boyfriend lived. SMJ was in respondent's care until March 3, 1997, when he was admitted to U-M Hospital for failure to thrive and rehydration and kept overnight. The following day he was placed in foster care and has remained there throughout the instant proceedings. Sometime before the termination hearing began in December 1998, respondent moved out of her mother's home into a place of her own, and at the time of the instant hearing continued to hold a job.

I

Respondent first argues that the trial court improperly terminated her parental rights as a matter of law under MCL 712A.19b(3), because the FIA did not make reasonable efforts to keep respondent and SMJ together before placing SMJ in foster care, and did not make reasonable efforts for reunification after he was in foster care. Respondent argues that since the "FIA did not make reasonable efforts[,] conditions may be rectified in a reasonable time," and that her parental rights should be reinstated immediately.

Respondent and amicus curiae, the Association for Community Advocacy (the ACA), argue that respondent was not offered appropriate services even though she could have learned to parent, and that the FIA failed to make reasonable accommodations for her disabilities as required under the Americans with Disabilities Act (ADA), 42 USC 12191 *et seq*.

Where termination of parental rights is sought, the existence of statutory grounds for termination must be proven by clear and convincing evidence. MCR 5.974(A), (F)(3); *In re Bedwell*, 160 Mich App 168, 173; 408 NW2d 65 (1987); see also MCL 712A.19b(1). The trial court's findings of fact are reviewed for clear error and may be set aside only if, although there may be evidence to support them, the reviewing court is left with a definite and firm conviction that a mistake has been made. MCR 5.974(I); *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996). Due regard is to be given to the trial court's special opportunity to judge the credibility of witnesses. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Once grounds for termination are validly established, "the court shall order termination of parental rights" and that additional reunification efforts not be made, "unless the court finds that termination of parental rights to the child is clearly not in the child's best interests." MCL 712A.19b(5); MCR 5.974(E)(2). That determination is to be made upon the evidence on the whole record, and is reviewed for clear error. *In re Trejo*, 462 Mich 341, 353-354, 356; 612 NW2d 407 (2000).

The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *In re Terry*, 240 Mich App 14, 24; 610 NW2d 563 (2000), quoting 42 USC 12132. A person who is developmentally delayed qualifies as a "disabled individual" under the ADA. *Id.*[3]

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[3] A parent must preserve the issue of reasonable accommodation under the ADA "either when a service plan is adopted or soon afterward." *In re Terry*, 240 Mich App 14, 26; 610 NW2d 563 (2000). "Where a disabled person fails to make a timely claim that the services provided are

(continued…)

A

The family court's opinion and order terminating respondent's rights sets forth its factual findings, including:

> 1. [SMJ] was born to Theresa Jones and Jackie Willoughby on 2/18/97; he weighed 3.22 kilograms (7.0988 pounds or 7 pounds 1.58 ounces).
>
> 2. [SMJ] lived with his mother, maternal grandmother (Lois Jones), grandmother's companion (Tom Robbins) at a home in Washtenaw County from 2/20/97 to the evening of 3/3/97 when he was hospitalized.
>
> 3. Prior to [SMJ]'s birth, the County Health Department assigned Public Health Nurse (PHN) Karla Stoermer to work with Ms. Jones who had a cognitive developmental delay and was identified as a person who would need support with her child to eliminate risk to him. Ms. Jones voluntarily met with Ms. Stoermer.
>
> 4. Ms. Jones voluntarily participated with the following services after the child's delivery and while he was in her custody.
>
> (a) Ms. Stoermer continued regular home visits and examinations of [SMJ]; health and medical consultations in the home; training of Ms. Jones in infant nutrition, safety and other needs; attended doctor's appointments with the child and mother and served as a liaison to the physician.
>
> (b) Healthy Families Maternal-Infant Support service (contracted through Catholic Social Services) for parenting education, coaching and modeling and miscellaneous assistance.
>
> (c) Parent Aide (Child and Family Services assistance with household organization and parenting skills;
>
> (d) WIC – milk, baby food and formula through federal program

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(…continued)

inadequate to her particular needs, she may not argue that petitioner failed to comply with the ADA at a dispositional hearing on whether to terminate her parental rights." *Id.* at 26. If the issue is not properly preserved a parent's sole remedy is to file suit under the ADA. *Id.*

Petitioner does not argue that respondent did not preserve this issue, and amicus curiae ACA's appellate brief is the only one to address the preservation issue. It argues that the issue of what constitutes reasonable accommodation under the ADA was officially raised by Marsha Katz of the ACA at an October 16, 1997 review hearing. Although we address the ADA issue on the merits, we note that the hearing referred to occurred **seven months after SMJ was removed** from respondent's care.

5. These services collectively did not constitute 24 hour support for the mother. However, she was living with her mother and Mr. Robbins who appeared to be receptive to the services and to helping Theresa.

6. The textbook infant weight gain pattern is an initial loss of up to 5 ounces by the fifth day of life, regain all birth weight by the 10^{th} day after birth, then a gain of 1 to 1.5 ounces per day.

7. Variations in this pattern are sometimes seen, usually based on illness, weak suck, developmental delay, insufficient feeding but sometimes just because of the biological differences between baby humans.

8. [SMJ]'s growth history was charted as follows:

02/18/97:	7 lb 1 oz	Birth weight on U/M Hospital scale
02-24-97:	6 lbs 14 oz	Dr. Ward's scale
02-28-97	6 lbs 13 oz	PHN scale
02-28-97	6 lbs 14 oz	PHN scale
03-03-97	6lbs 14 oz	U/M Emergency
03-04-97:	7 lbs .99 oz	U/M scale
03-12-97	7 lbs .99 oz	PHN scale (foster home)
03-26-97	9 lbs	PHN scale (foster home)

9. Ms. Stoermer became concerned about weight on 2/24/97 and set up feeding and elimination recording charts for the mother to complete with paste-on stars; she told the mother it was necessary for the child to eat something every 2-4 hours.

10. [SMJ]'s physician was also concerned about weight stagnation during this period and consulted with PHN about responses to it.

11. On 3/3/97, Ms. Stoermer was advised by Dr. Ward to contact him if there had not been an improvement in weight.

12. Ms. Stoermer called the doctor because there was no improvement in weight gain and [SMJ] was taken to emergency at the doctor's direction to be examined for dehydration and failure to thrive.

13. [SMJ] was admitted to the hospital, showed a three (3) ounce weight gain overnight and continued uninterrupted growth in hospital and in foster care.

14. The following significant incidents, among others, regarding nutrition were noted by service providers during the time that [SMJ] was in his mother's care: the mother frequently removed the bottle from the baby's mouth during feeding to wipe his lips or tidy him; PHN observed mother give him calorie-less water for claimed beneficial purpose; on 10th day of life, mother reported that baby is sleeping through the night; she commented to Ms. Fair on how well he slept through the night; Ms. Jones's charts showed feedings of 1-2 ounces every 2-4 hours but SMJ had not gained weight.

15. After the child was placed in temporary custody and jurisdiction, all of the previous programs continued except:

(a) the PHN worked with [SMJ] in the foster home

(b) following a psychological evaluation, therapeutic counseling services were provided, first from Dr. Thomas Fournier, a psychologist [,] and then from Ms. Grogan, a clinical social worker.

(c) on a very few occasions, [SMJ] was too sick to be present for the visits or the hands-on parenting sessions with his mother, so a doll was used in his place.

16. The Catholic Social Services sessions plus visits (which were also, quite properly, used for skill-building and parenting modeling) totaled 8 hours per week until the court halved the visitation time on 8/28/97 because of the effect on [SMJ].

17. Ms. Jones had the services of Community Mental Health (CMH) since, at least mid-1997; Marietta Smith was her case manager and payee; Washtenaw Interventions worked with her on social and community skills.

18. **The service providers met in August 1997 and agreed with the conclusion reach[ed] by Ms. Stoermer and Ms. Fair that Ms. Jones had very little understanding of (or ability to understand) child nutrition, needs and safety and could not parent alone**;

19. In 1997 CMH was contacted by service providers in this case about 24 hour support for Ms. Jones and her son but CMH did not have an appropriate program for the needs which were described for Ms. Jones by the service providers.

20. Between the time of removal until the setting aside of the release, Ms. Jones displayed great affection for her son and enjoyed her time with him very much; she sometimes read to him; she sometimes played with him; she never missed a visit unless there was an extremely good reason; she prepared carefully for his visits; she followed recommendations for his comfort at the time they were made during the visits.

21. **There is ample evidence that, even with repetition and demonstration, Ms. Jones was unable to learn basic infant parenting skills, or learn it quickly enough for a growing child and/or retain the information. Despite advice, recommendations and correction at several consecutive visit/parenting sessions**

(a) she held the baby's bottle flat into his mouth so that sucking was difficult

(b) she continued to hold the baby flat for feeding rather than cradling him which made it difficult to achieve proper pace and air exchange.

(c) she frequently had to be told when to feed him although she was advised at the beginning of the visit when he last ate.

(d) she (and her family members) had to be repeatedly reminded to wash their hands before feeding the baby, even after changing him;

(e) she continued to remove the bottle from his mouth after he ate small amounts, neaten or wipe him or the bottle and return it to his mouth, sometimes extending the feeding for more than three hours;

(f) with prompting, she fed him correctly

(g) Ms. Jones continued to do things for [SMJ] that did not need to be done: repeated diaper-changing, repeated feeding; picking him up when he was sleeping or content.

(h) Although Ms. Jones did some tasks repeatedly, she often did not do them at the right time and had to be reminded when to diaper or feed him.

22. **Ms. Jones' ability to see risk was not adequate for** [SMJ]'s **safety or she assumed others were going to care for him.**

(a) When he was a newborn she abruptly walked out of the doctor's office without a warning to the doctor or PHN leaving [SMJ] lying on the examination table;

(b) Later she abruptly and without notice, walked out of visits for extended periods when her relatives were with him;

(c) At Judson Center visits she allowed him to crawl out of the visiting room and into the hall and bathroom despite repeated instructions to prevent this by closing the door;

(d) Although the foster parent had warned Ms. Jones about a danger connected with handling the stroller a particular way, she did the same thing the next time she was using the stroller, creating a hazard for [SMJ].

* * *

> 26. Shortly after he came into foster care, [SMJ] began displaying signs of developmental delays which included not holding his head up or standing on his legs at the time expected and not initiating interaction with people or objects.
>
> 27. The Early On Social Worker was most concerned with the latter emotional delays "His inability to initiate relationships is seriously impeding his progress and will continue to do so at an alarming rate." (HELP evaluation, June 1997) "[SMJ] remains delayed in many areas of development. However, the severity of the delays is diminishing . . . . [SMJ] is performing beyond what is age appropriate in the areas of emotions/feelings and coping. At the time of his first evaluation. . . these areas were of the most troubling and had the potential to interfere with his progress the most. **This is a baby who is having his emotional needs met and is learning to respond in kind." (Infant-Toddler Developmental Assessment Report, March 1998). Ms. Greer's March 1999 report (with letter attached) is clear that <u>a challenging, stimulating environment reverses the dangerous emotional complacency she saw in the infant</u> [SMJ].** [Emphasis added.]

Respondent's parental rights were terminated under the following statutory grounds:

> (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 disposition order, and the court, by clear and convincing evidence, finds either of 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 age of the child.
>
> * * *
>
> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.
>
> * * *
>
> (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. [MCL 712A.19b(3)(c)(i), (g), and (j).]

B

The record does not support respondent's argument that she was offered only generic services that were not sufficiently tailored to her cognitive disabilities. It is true that there was

testimony from two ACA representatives that the services respondent received were insufficiently tailored or suited to her cognitive deficits and that reunification efforts were sub-standard. However, there was ample testimony to the contrary. See court's factual findings, quoted *supra*.[4] The court clearly considered all the testimony, and concluded, as do we, that

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[4] For example, Latonya Fair of Catholic Social Services testified at the termination hearing that she became involved with respondent on February 5, 1997, several weeks before SMJ's birth. Fair testified that her initial assessment of respondent was based on the assumption that respondent would be living with her mother and brother. Fair testified that in March 1997, respondent told her that she wanted an apartment for herself and SMJ and did not want to live with her mother, and that this concerned Fair. Fair testified that

> "with her mother there it was my hope that mom could sort of intervene. You know. And say well not you can't take the baby out on this cold night. You know. Those kinds of things – or the baby looks sick. We need to take the baby to the emergency room. You know. Just sort of intervene and that's something that she needs. She needs assistance and she needs direction and guidance.
>
> *Q*. At this point, were you comfortable with Theresa being able to make those kinds of assessments that she had to on her own?
>
> *A*. No. No. I was not comfortable at all.

Fair testified that respondent's mother had told her she would take several weeks off work when SMJ was born, but that she did not do so, and that that raised Fair's concerns. Fair testified that CSS tried to compensate by having the worker visit respondent twice a week, instead of once. She testified that she agreed with the removal of SMJ from respondent's care because he was losing weight and did not look well, and because respondent "simply did not understand the seriousness of him losing weight and not really responding to stimulus." However, Fair testified that it was not until August 1997 that she came to the final decision that respondent could not parent SMJ on her own, when she learned from the CSS worker that had been visiting respondent twice a week that when respondent was asked how she knew when to feed SMJ and how to care for SMJ, that respondent answered when the CSS worker tells her to. Fair testified that at that point "[w]e had provided Theresa with the most comprehensive, extensive services that Catholic Social Services could provide. . . I had transferred a lot of my cases to other fellow workers and worked with Theresa's case solely for a couple of months." Fair testified that she was able to get Social Security benefits in place for respondent, and that she sought the assistance of Community Mental Health (CMH). Fair testified that in order for respondent to qualify for DD services, CMH required documentation that the disability happened before age 21, and that she (Fair) did not have a lot of documentation as to respondent's disability. She testified that before getting an assessment of respondent, a psychological evaluation had to be done, and that Fair took her to Michigan Rehabilitation Services, went through orientation with her, and that was what led to the first psychological evaluation in April 1997. Fair testified that home services by CSS stopped in August 1997 because respondent and respondent's mother asked that she, Fair, and the CSS worker not return to the home. The services continued at CSS.

(continued…)

respondent was provided extensive services, including parental training and parent modeling, that were individualized. The family court's opinion and order is clear that it considered and weighed the testimony of Ms. Katz and Ms. Carrellas of the ACA.[5] In discussing the evidence that supported its determination that there was no reasonable likelihood that the conditions that led to termination would be rectified within a reasonable amount of time given SMJ's age, and that reasonable efforts were made toward reunification, the family court noted:

(…continued)

When asked at the termination hearing "In your opinion does Theresa have the ability to parent [SMJ] properly?" Fair responded:

> No she doesn't. Not independently she does not.
>
> *Q*. What do you foresee, if anything, some type of plan that may be available that would assist her to bring [SMJ] back into the home?
>
> *A*. Um—I really can't think of one particular plan or agency that could really fully assist Theresa and [SMJ] the way that they would both need to have assistance. Theresa will certainly need close to 24-hour supervision, a lot of direct guidance and support, prompting, as [SMJ] grows and develops.
>
> * * *
>
> And also the other issue at hand is that Theresa had verbally expressed to me that she wanted to live independently. She did not want to live at home anymore. So—and given the fact that Theresa hasn't really lived solely on her own, she would need a lot of assistance and guidance in learning how to live independently as well, in addition to parenting support.
>
> *Q*. At this point, do you think it's in [SMJ's] best interest that the rights of Theresa be terminated?
>
> *A*. I think it is in [SMJ]'s best interest.
>
> *Q*. And why is that?
>
> *A*. Because I don't think that [SMJ] would get the necessary needs that he needs to have met to help him grow and develop and thrive into adulthood. I don't believe that Theresa would do anything intentionally to harm [SMJ], but there certainly have been periods of time where she's exercised poor judgment in terms of his care or what she would do if he was in her care.

Fair also testified that respondent stopped attending parenting classes at CSS in October 1997.

[5] Carrellas testified that she had never seen or examined SMJ, and had never seen respondent with SMJ, although she had met respondent.

[ ] The evidence shows that Ms. Jones has a cognitive disability; she has significant difficulty with deductive reasoning, following through with instructions, retaining information and staying focused on subjects. (Stoermer, Fournier, Fair). She thinks literally and concretely. (Katz, Fourneier, Stoermer, Carrellas) Learning is not from insight and her own deductions but from the observation by others and the repeated correction or re-direction to Ms. Jones. (Katz, Fair). So someone capable must be present with Shawn and Theresa to see and analyze what is happening, to adapt the environment and responses for Shawn and to train Theresa.

A cognitive developmental delay is not going to go away. Therefore, these barriers to safe parenting will most likely exist during [SMJ's] minority.

(b) Ms. Jones' disability cannot be "trained away" to enable her to parent. Ms. **Katz** testified that Ms. Jones would benefit from one-on-one, hands-on, supervised parenting training with [SMJ] present . . . . and she would have to be trained for the eventualities of parenting so she would know how to respond. Ms. **Carrellas** testified that support providers would have to practice with Ms. Jones over and over to get her to understand a parenting procedure and if she was not doing it, she would need help in doing it. This is a very sensitive and compassionate position to take on behalf of Ms. Jones but the risks to [SMJ] are enormous. Neither one of these witnesses suggested that such training would ever end or that, having had such training, Ms. Jones could ever be left on her own with [SMJ]. Ms. Jones may be able to learn a job by patterns, repetition or rote; learn to read, write, clean her house, prepare a setting for child visitation but there is nothing rote or predictable about raising a child. The parent is constantly presented with challenges from the lively, creative unpredictable child, from his natural development and from his relationship with external factors. Ms. Jones cannot be programmed for every eventuality . . . . If she cannot analyze, abstract or deduce and thus select the safe option, then [SMJ] is at risk physically or emotionally at any age at which a child cannot rely on himself for guidance and protection.

(c) Reasonable efforts were made to try to rectify the conditions but without success

(i) There was appropriate parent training provided to Ms. Jones. It consisted of coaching, role-modeling; it was hands-on and one-on-one, just as her advocates said it should be. Ms. Jones's [sic] had four hours of parent training per week plus another four hours of visitation per week until it became clear that [SMJ] needed relief and not much progress was being made. Ms. Jones' advocates recommended more parent skills time but it is clear from their testimony that they believe, like the nurse, the FIA and Healthy Families that Ms. Jones needed 24 hour parenting support.

All the parenting education in the world was not going to reunify this family because it was not going to make Ms. Jones any more capable of understanding, recognizing and properly adjusting for the next large or small parenting challenge.

> The parenting program may have been helpful to Ms. Jones in some ways but it was 'wheel-spinning' as far as the goal of reunification was concerned.

The record supports that the FIA provided respondent in the instant case with the foster care services it had available. The caseworkers were unable to access more services for respondent through the FIA child services division and its contracting agencies.

In *In re IEM*, 233 Mich App 438; 592 NW2d 751 (1999), this Court upheld the termination of parental rights of a cognitively disabled mother:

> The opinion reflects that the probate court carefully considered the testimony of many witnesses regarding respondent's potential to parent effectively if assisted by someone. For example, the probate court found that several witnesses' testimony established that to function effectively as a parent respondent would require constant supervision. The probate court also found that several witnesses had testified that despite the possibility of receiving parenting assistance, because of her cognitive and emotional impairments respondent would unlikely ever improve her skills sufficiently to undertake the complex responsibilities of parenting. The court concluded that it had found "clear and convincing evidence that [respondent] is an intellectually and emotionally limited teenager who, because of her significant longstanding deficits, cannot be expected to develop the intellectual and cognitive ability to be a safe and nurturing parent regardless of how long or under what conditions she is assisted. [*Id.* at 452.]

Similarly, respondent in the instant case, although not a teenager, is cognitively disabled. There was considerable testimony and evidence that respondent would not be able to parent SMJ without virtually constant assistance and that respondent was unable to independently recognize risks to SMJ's safety. See note 4, *supra;* see also *Terry, supra,* in which this Court noted that even if the issue of accommodation under the ADA had been timely raised, the record did not support the claim that the agency's provision of extensive services, albeit of less-than 24-hours per day, would have violated the ADA:

> It is undisputed that respondent was provided with extensive services, and there is no evidence that she was denied any services that are available to parents with greater cognitive abilities. The caseworkers were aware of respondent's intellectual limitations and would repeat instructions multiple times and remind her when tasks had to be completed. Respondent received assistance through GCCMH to address both personal and parenting problems in a program that was tailored to developmentally disabled persons. An arrangement under which respondent lived in the children's foster home was attempted but proved unsuccessful. Petitioner had no other services available that would address respondent's deficiencies while allowing her to keep her children. The ADA does not require petitioner to provide respondent with full-time, live-in assistance with her children.
>
> Respondent's contention that she needed even more assistance from petitioner to properly care for her children merely provides additional support for the family court's decision to terminate her parental rights. After her children have come

> within the jurisdiction of the family court, a parent, whether disabled or not, must demonstrate that she can meet their basic needs before they will be returned to her care. "If a parent cannot or will not meet her irreducible minimum parental responsibilities, the needs of the child must prevail over the needs of the parent." [*Terry, supra* at 27-28 (citations omitted).]

The ACA points to testimony from its representatives that, had it been asked, it could have been able to pull together services comprising up to twenty-four hour assistance to respondent, if such were needed. However, that testimony was first given at a review hearing in October 1997, well after SMJ had been removed from respondent's care. The family court at that time was well familiar with respondent's case and her failure to benefit from the services provided her to the extent that she would not need constant assistance in caring for SMJ. See court's factual findings, quoted *supra.* The family court justifiably concluded that no matter how extensive the services, respondent would not be rendered a competent parent that could adequately care, and provide a safe environment, for SMJ.

We agree with petitioner that this "is a very difficult and sensitive case, and the People are and the Court was sympathetic to Ms. Jones' situation. It is uncontested that she never harmed [SMJ] and she loved her child tremendously." However, as petitioner notes, once an element of MCL 712A.19b has been met by clear and convincing evidence, the court may terminate parental rights **if in the best interests of the child**. MCR 5.974(F)(3). As discussed in section II, *infra,* we conclude that the existence of statutory grounds for termination were proven by clear and convincing evidence.

Under the circumstances present here, the family court did not clearly err in finding that the agency had made reasonable efforts toward reunification. The ADA does not require that the agency provide twenty-four hour assistance to a disabled parent. See *Bartell v Lohiser,* 12 F Supp 2d 640, 650 (ED MI, 1998), aff'd 215 F3d 550 (CA 6, 2000). Under the ADA, regardless of the parent's disability, the parent must be able to provide basic needs for his or her child. *Terry, supra* at 27-28.[6]

II

Respondent next argues that the family court abused its discretion in finding that the evidence was clear and convincing, because the agency failed to accommodate her disabilities, and never gave her a real opportunity to rectify the conditions that brought the child into care.

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[6] We reject respondent's argument that the FIA violated MCL 712A.18f(6)(a), which requires the agency to communicate with the child's doctor in failure to thrive cases, because subsections (6) and (7) did not become effective until March 1, 1999 -- at which time the termination hearing was already under way. See MCL 712A.18f (historical and statutory notes). The case service plan was written before these subsections were enacted, and no proceedings were conducted after the effective date to determine whether to send the child home. Rather, the issue in subsequent hearings was whether to terminate respondent's parental rights. Therefore, these provisions do not apply to this case.

Petitioner responds that respondent was given services before and after the baby was born, but his weight loss became critical and he had to be removed. Petitioner notes that SMJ gained weight after he was removed. It further notes that conditions have not changed because respondent has been unable to learn the skills necessary to care for her child, and that respondent was also unable to recognize risks and provide for SMJ's safety. Petitioner asserts that although respondent loves SMJ, she would need around-the-clock support in order to safely and properly parent him, and there was no evidence that she was ever going to improve. Termination was therefore in the child's best interests.

Regarding failure to rectify conditions, it is clear that, despite the services provided, respondent's parental skills did not improve significantly, and certainly not to the extent necessary to permit her to care for SMJ without assistance. Although respondent's mother and respondent's mother's boyfriend testified positively about respondent's parenting skills, the court found their testimony lacking in credibility and that determination is entitled to deference on appeal. Further, as noted by the court, respondent's cognitive deficits cannot be removed by training. There is no reasonable possibility that respondent's parental skills can be rectified within a reasonable time considering the age of the child. Thus, the court correctly found that the ground for termination under subsection (c)(i) was established.

With regard to providing proper care, respondent was and remains unable to parent her child without assistance. There is no reasonable possibility that she will become able to provide proper care and custody without assistance within a reasonable time, considering the age of the child. Thus, the court correctly found that termination under subsection (g) was established.

Regarding the likelihood that the child would be harmed if returned to respondent's care, the evidence showed that her feeding skills were still poor, that she walked out on the baby at the doctor's office, and that she failed to appreciate the danger of not using a stroller properly, in allowing the child to play with small objects or electrical outlets, and the like. Given the deficits in her parental skills, especially in the area of child safety, there was clear and convincing evidence that the child would be harmed if returned to her care. The court therefore correctly found that the ground for termination under subsection (j) was also established.

The family court did not clearly err in finding that there was clear and convincing evidence of the statutory grounds for termination. Respondent does not argue that termination of her parental rights was clearly contrary to the child's best interests.

III

Respondent next argues that her counsel was ineffective and there was serial representation. She notes that she was represented by four different court-appointed attorneys and a guardian ad litem. Respondent notes that the "FIA and Ms. Jones' court appointed attorneys were told to come up with a plan from the beginning. A viable plan for reunification was not discovered until the last attorney was appointed, and the termination hearings were in progress." She further notes that her last lawyer failed to properly cross-examine witnesses and did not address the agency's failure to make reasonable efforts toward reunification. Respondent notes that she was prejudiced by having been represented by several different attorneys, most of whom did not have time to become familiar with the file, let alone zealously advocate on her behalf.

Because respondent failed to move for a *Ginther*[7] hearing or for a new trial, our review is limited to mistakes apparent on the record. See *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). The right to effective assistance of counsel applies by analogy in termination proceedings. *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986). To establish ineffective assistance of counsel, respondent must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Respondent must also overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that she has been prejudiced by the error in question. *Pickens*, *supra* at 312, 314; *Tommolino*, *supra* at 17. To establish prejudice, respondent must show that the error might have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* at 312, 314. Where counsel's conduct involves a choice of strategies, it is not deficient. *LaVearn*, *supra* at 216.

We first note that there was no "serial representation" as defined by respondent, as none of the attorneys who represented her "switche[d] sides to represent the other party . . . ." It is true that Ms. Schikora served as referee at the hearing in which the mother attempted to release her parental rights. However, she was initially a prosecutor, not the mother's attorney. Respondent's serial representation argument fails.

On the merits, respondent fails to point to any specific mistakes apparent on the record, thereby leaving this Court with nothing to review. See *Hurst*, *supra* at 641. Her attorneys' failure to come up with a reunification plan is not plain error apparent on the record. The alleged deficiencies in her last attorney's cross-examination of various witnesses is a matter of trial strategy, and cannot be the basis for finding ineffective assistance. Further, given the evidence of respondent's deficits in parenting skills, she has not shown that any of these alleged errors might have made a difference in the outcome of the termination hearing.

IV

This Court granted respondent's motion to remand to provide her with an opportunity to file "a motion for an evidentiary hearing for development of a factual record regarding the minor child's diagnosis of autism," by order dated February 7, 2001, and retained jurisdiction. Proceedings on remand were limited to the issue raised in the motion. The motion to remand indicates that respondent gave birth to a second child on December 28, 2000, and that, as of January 25, 2001, she and the father (who is not a respondent in these proceedings) have been provided around-the-clock services by various agencies, enabling them to maintain custody of their new child. In the motion, counsel argued that had such services been provided in this case, respondent would have been able to keep custody of SMJ. Further, counsel argued that SMJ's recent diagnosis of autism called into question the accuracy of the earlier diagnosis of failure to thrive, because autism may have been the cause of his early feeding problems. Thus, reasonable

[7] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

efforts toward reunification had not been made, and termination of respondent's parental rights was improper because it was not supported by clear and convincing evidence. Counsel sought to have the case remanded for expansion of the record by "physicians[']testimony, an explanation of the conflicting record, and a ruling by the lower court."

At the March 27, 2001 hearing on remand,[8] there was no mention of respondent's second child, nor of whether she still had custody of him. Petitioner conceded that SMJ was autistic, thus eliminating the need to take testimony on that issue. The court declined to hear testimony on whether respondent would be able to care for an autistic child with accommodations, finding that that issue was not properly before the court.

Dr. Daniel Kessler, director of developmental and behavioral pediatrics at St. Joseph's Hospital in Phoenix, Arizona, testified by telephone as an expert in that field. Dr. Kessler testified that autistic infants are commonly "very quiet and undemanding" -- what many parents would describe as a "good infant," and that "[t]his may result in their not demonstrating the signs of hunger, the same way another more typically developing child might do." "So where as a more typically developing child may indicate hunger through signs of irritability or fussiness or crying every two to five hours, this child may sleep for an extended period of time and not receive feeding of a sufficient volume of formula or breast feeding to gain adequate weight." They may therefore lose a "significant" amount of weight as compared to the normal initial ten percent. This pattern might continue for the first six months. Dr. Kessler did not examine the child in this case.

Dr. Kessler did not believe that the child's behavior would depend on the caregiver. Autistic infants "are much more oblivious of the care taking environment than would be more typically developing children." "They would generally be expected to have the same behavior in a wide range of care taking environments."

Dr. Susan Burton-Hoyle, executive director for the Autism Society of Michigan, testified as an expert in autism. She reviewed SMJ's educational developmental records, but not his early medical records. She was aware that respondent was developmentally delayed, and that her IQ was in the 60s, but she was not intimately familiar with her disabilities. Dr. Burton-Hoyle agreed that parents of autistic children commonly look back and remember "that [the children] were passive, that they didn't seem to want to eat, that they slept a lot." She testified that autistic children often do not tolerate certain foods or certain textures. She testified that parents and caregivers had reported that an autistic child might reject a certain food, but "if a new person just started feeding [him] with a different bottle or a different type of formula that the child could respond differently."

Dr. Burton-Hoyle testified that "[t]here are extensive supports" available for parents of autistic children, and that parents need those supports regardless of their educational or economic

[8] Petitioner opposed respondent's motion for an evidentiary hearing. The court overruled the objection, finding that the remand order contemplated that evidence would be taken concerning SMJ's condition, and that findings would be made concerning whether SMJ's autism would have had any impact on the court's earlier decision to terminate respondent's parental rights.

backgrounds. There are "respite funds available from the Department of Community Mental Health"; there is also a means-tested assistance such as the "children's Medicaid waiver which is extensive supports in speech services -- OT services, psychological services and direct care support in the home." There is also a "Family Support Subsidy" that the parents can use to purchase whatever services they need, for example, speech therapy, occupational therapy, or special assistance in the home. Support groups are also available throughout the state.

Dr. Burton-Hoyle knew of low IQ parents who received supports and successfully were raising an autistic child. She believed that "with support [respondent] could successfully parent a child with autism." She agreed that raising an autistic child could cause a lot of stress, and that parents needed flexibility and support. She believed that SMJ's early feeding problems and weight loss were consistent with autism.

Sandy Glovac, occupational therapist and director of a clinic for developmentally disabled children, testified as an expert in those areas. Autistic children comprised about forty percent of her practice. She reviewed SMJ's medical and school evaluation records; she had not reviewed respondent's records. She had experience with developmentally disabled parents raising developmentally disabled children, but not autistic children. Ms. Glovac agreed that autistic children often have feeding problems, and that an autistic child who is refusing to eat may respond to a change in the brand of formula, or even to a different type of bottle.

Ann Carrellas, director of the family resource center for the Association for Community Advocacy ("ACA"), testified that respondent suffered from a mild impairment, and that her IQ was in the 60s. Ms. Carrellas had helped developmentally disabled parents to raise children, but did not recall any whose children were autistic. Ms. Carrellas had "frequently" seen respondent "parent a child," and believed that she was capable of raising SMJ with appropriate supports. The ACA could assist by ensuring access to all the appropriate resources available to her, in collaboration with other agencies. Ms. Carrellas believed that even non-disabled parents would need support to raise an autistic child.

The child's foster mother, Sandra Agge, testified that SMJ was four years old and had lived with her since he was thirteen days old. When she picked him up from the hospital, they told her to wake him up every hour and a half to feed him. After being in her care for about a week, he started waking up and crying to be fed like any other child. He "was a good baby" and "only cried when he was hungry or when he was wet." He gained weight immediately. Agge testified that SMJ did not eat at school because he was only there for an hour or two a day and she was "right there with him."[9] He often disrupted family meals. She believed that he acted like a two-year-old even though he was four. Agge testified that SMJ's pediatrician was still not convinced that he was autistic, although she knew that he was developmentally delayed. He was "highly functional" and aware of his surroundings, but did not adapt well to change. He would interact with other children, although slowly, and had imaginary play. He also had good verbal skills. She believed that the autism diagnosis was based on his background, sleep patterns, and

[9] Apparently, SMJ had tantrums if she attempted to leave him alone at pre-school.

his lack of interaction with adults. He communicated and interacted better at home than he did during testing.

For purposes of the hearing on remand, the family court found that SMJ was autistic. The court conceded that Dr. Kessler, Dr. Burton-Hoyle and Ms. Glovac were "experts in dealing with autistic children and their families," but gave their testimony little weight because none of them had examined the mother or the child. Further, Ms. Glovac had never worked with a developmentally disabled parent trying to raise an autistic child. The court found that, despite the autism diagnosis, Ms. Carrellas' testimony was the same as it had been at the termination hearing -- that respondent could raise the child with appropriate supports. The court noted that Ms. Carrellas' position had been rejected at the termination hearing. Quoting from its prior findings, the court found that termination was based on respondent's lack of parenting ability rather than the child's condition. The court concluded that the earlier finding that respondent was unable to learn basic parenting skills had not been altered by the autism diagnosis. Further, although the child's diagnosis had changed, the child's behavior and the mother's abilities remained the same as they had been all along. The court therefore reiterated its prior holding that respondent's parental rights should be terminated.

We find no error. We note that it was apparent in 1997, years before SMJ's diagnosis of autism in 2000, that he suffered from significant developmental delays in a number of areas. That SMJ's eating may have been affected by autism does not change the sad reality that respondent could not parent him safely either at the time he was removed or subsequently. Respondent's cognitive deficits could not be trained away and there was no evidence that she could ever parent SMJ adequately. Thus, the trial court did not err in terminating respondent's parental rights, or in subsequently concluding on remand that its initial decision was unaffected by the new evidence that SMJ is autistic.

V

Respondent's brief after remand also argues that the family court's exercise of jurisdiction was improper because there was insufficient evidence presented at the adjudicative hearing to support asserting jurisdiction over SMJ. She notes that SMJ's weight loss and alleged failure to thrive were caused by his autism, not by her neglect, and therefore there was no basis to assert jurisdiction. We disagree.

A party may attack the family court's subject matter jurisdiction at any time. *In re Hatcher*, 443 Mich 426, 438; 505 NW2d 834 (1993). In contrast, "the exercise of that jurisdiction can be challenged only on direct appeal," not by collateral attack. *Id.* at 439. The only exception to that rule is where jurisdiction is exercised without any legal evidence being received to support it. *Id.* at 440-441. "[T]he [family] court's subject matter jurisdiction is established when the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous." *Hatcher*, *supra* at 437; *In re SR*, 229 Mich App 310, 314; 581 NW2d 291 (1998). On the other hand, "[t]he valid *exercise* of the court's statutory jurisdiction is established by the contents of the petition after the judge or referee has found probable cause to believe that the allegations contained within the petition are true." *Hatcher*, *supra* at 437, 444 (emphasis added). "Culpable neglect need not be shown for the court properly to exercise jurisdiction." *In re Middleton*, 198 Mich App 197, 199; 497 NW2d 214 (1993). Further, errors in the *exercise* of jurisdiction, no matter how grave, do not defeat the court's

subject matter jurisdiction so as to render the judgment void; "[j]urisdiction to make a determination is not dependent on the correctness of the determination made." *Hatcher*, *supra* at 439 (quoting *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 545-546; 260 NW 908 [1935]).

We review questions of statutory interpretation de novo, and findings of fact for clear error. *SR*, *supra* at 314-315. The initial petition alleged that SMJ was born on February 18, 1997, weighing seven pounds; that by March 3, 1997, he weighed only six pounds and fourteen ounces; that he should have been gaining between six and eight ounces a week; that he had no medical problems that would cause him to lose weight; and that Dr. Randy Ward, respondent's doctor, believed that respondent was unable to care for the child. The petition also alleged that respondent fed SMJ water, contrary to the public health nurse's advice; that respondent was developmentally delayed, and rigidly followed instructions even if not in the child's best interests; and that she left the baby unattended at the doctor's examining table while she went to the restroom.

At a March 5, 1997 preliminary hearing,[10] respondent waived her right to a probable cause hearing and the petition was authorized. However, she denied the allegations of the petition. At respondent's pretrial hearing, the petition was amended to add that SMJ had lived in her care continuously until the petition was filed; and that he had no *known* medical problems that would cause him to lose weight. Several paragraphs were stricken and respondent then pleaded to amended paragraphs. Respondent testified that she fed the child every two hours, but that he would go to sleep after consuming a couple ounces of formula. She admitted that he had lost weight while in her care, and that he had no known medical problems.

Considering only those allegations respondent admitted--that she was developmentally delayed, and that SMJ had lost weight since birth while in her care, even though he had no known medical problems, the allegations were sufficient to place the child within the provisions of subsection (b)(1). *Hatcher*, *supra* at 433, 434-435. Under *Hatcher*, the family court had subject matter jurisdiction because the case was "of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous." *Id.* at 444.

Whether SMJ's weight loss was due to autism rather than respondent's neglect goes to the family court's *exercise* of jurisdiction, not its subject matter jurisdiction. Under *Hatcher*, respondent cannot collaterally attack the court's exercise of jurisdiction by showing that the facts are not as the parties then believed. *Hatcher*, *supra* at 439; see also *Altman v Nelson*, 197 Mich App 467, 472-473; 495 NW2d 826 (1992) (subject matter jurisdiction does not depend on the truth of the allegations). Further, this case does not fall within *Hatcher*'s exception for collateral attacks ("where jurisdiction is exercised without any legal evidence being received to support it"), because respondent's plea provided legal evidence to support the court's exercise of jurisdiction. *Hatcher*, *supra* at 440-441. Reversal on this basis is not warranted.

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[10] Although the transcript is labeled preliminary inquiry, the petition requested placement of the child and therefore the proceeding was a preliminary hearing.

VI

Respondent's final argument is that a physician's report was improperly excluded on remand. We disagree.

We review the family court's decision to exclude evidence at a termination proceeding for abuse of discretion. *In re Caldwell*, 228 Mich App 116, 123; 576 NW2d 724 (1998). An erroneous ruling will not merit reversal unless the ruling affects a party's substantial rights. *Id.*; see also MCL 710.51(6), MCR 2.613(A), MRE 103(a).

At the hearing on remand, respondent offered a letter from Dr. Richard Alper into evidence. Petitioner and the child's attorney objected on the basis of hearsay and lack of foundation. The court rejected respondent's argument that the rules of evidence did not apply at this hearing and also excluded the letter because the doctor was not present to be cross-examined. Respondent offered to attempt to reach Dr. Alper by telephone, but the record does not reflect the outcome of that call.

Because this case was remanded for a hearing on issues relating to the termination of respondent's parental rights, we apply the rule governing termination hearings. See MCR 5.974(F)(2).[11] There was no finding that the doctor was reasonably available to be cross-examined. However, we conclude that even assuming that the family court erroneously excluded Dr. Alper's letter, the ruling did not affect respondent's substantial rights.

Dr. Alper's letter states that he is a pediatrician whose knowledge of the case was provided by respondent's attorney, and that he was aware of SMJ's early failure to thrive, and the later autism diagnosis. He did not know "if the feeding (formula)" "was inadequate because of autism," but he "suspect[ed]" that the child's bond with the mother was "poorly established" due to the child's autism. He would have urged the mother to breast feed as a way to establish bonding and prevent weight loss. He would have also urged close follow up of the mother, supporting services, and home visits. He believed that the weight loss should have been noticed and addressed earlier, which might have prevented the child's failure to thrive.

Although the family court did not expressly address the issue, the letter was marginally relevant or material to the issues on remand and the letter's content could not have affected the outcome of that proceeding. Respondent's substantial rights were not affected, thus reversal on this basis is not appropriate.

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[11] MCR 5.974(F)(2) provides that, at termination hearings:

> all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value, even though such evidence may not be admissible at trial. The respondent and the petitioner shall be afforded an opportunity to examine and controvert written reports so received and shall be allowed to cross-examine individuals who made the reports when those individuals are reasonably available.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Michael R. Smolenski