STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JOHNATHAN MICHAEL GWYN, Minor.

KATHLEEN LESLIE KALINOVIK,

Petitioner-Appellee,

v

TRACY RAY GWYN,

Respondent-Appellant.

UNPUBLISHED
December 23, 2003

No. 248220
Ontonagon Circuit Court
Family Division
LC No. 02-001067-NA

In the Matter of PAIGE EMILY GWYN, Minor.

KATHLEEN LESLIE KALINOVIK,

Petitioner-Appellee,

v

TRACY RAY GWYN,

Respondent-Appellant.

No. 248221
Ontonagon Circuit Court
Family Division
LC No. 02-001068-NA

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Petitioner and respondent are the biological parents of the minor children. In 1998, respondent was convicted of sexually abusing one of the children, and, one year later, the parties divorced with sole legal and physical custody awarded to petitioner. Petitioner subsequently filed a petition to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(a)(ii), (b)(i), (g), (j), and (n)(iii). Following a hearing, the court terminated respondent's parental rights to the children. Respondent appeals as of right. We reverse and remand.

Respondent first argues that reversal is required because the trial court never conducted a "jurisdictional adjudication" to find that the children came within the jurisdiction of the court. Respondent also argues that this error was compounded by the fact that respondent was unable to exercise his right to a jury trial at this phase. MCR 5.972[1] provided that the trial court was required to find, by a preponderance of the evidence, that the children were under the jurisdiction of the court, as defined by MCL 712A.2(b). *In re CR*, 250 Mich App 185, 200-201; 646 NW2d 506 (2002).

Only one subsection of MCL 712A.2(b) is applicable to this case and it provides that the court has jurisdiction over a juvenile:

> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship.

Additionally, a parent does have a right to demand a jury trial at the adjudicative phase of child protective proceedings. MCR 5.911(A); *In re PAP*, 247 Mich App 148, 153; 640 NW2d 880 (2001).

In this case, a trial date was set for October 3, 2002. Respondent was sent a notice of this hearing, but did not respond. [2] Also, respondent was appointed counsel before the trial was continued on December 19, 2002, yet he made no demand for a jury trial. Therefore, we find that respondent waived this right. *In re Hubel*, 148 Mich App 696, 699-700; 384 NW2d 849 (1986).

In regards to the court's failure to make findings regarding its jurisdiction over the children, we find that this constituted error. "The procedural safeguards used in adjudicative hearings protect parents from the risk of erroneous deprivation of their liberty interest in the management of their children." *In re PAP, supra* at 153. And the record in this case is devoid of any evidence that the court made a finding as to its jurisdiction or was even aware that such a finding was required. However, the harmless error rule, proscribed in MCR 2.613, applies to child protective proceedings. MCR 5.902(A). MCR 2.613(A) provides that reversal is not required unless a refusal to do so is inconsistent with substantial justice. If this was the court's only error, we might find that it was harmless given that the evidence established respondent had

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[1] The court rules governing child protective proceedings were amended and recodified as part of new MCR subchapter 3.900, effective May 1, 2003. This opinion refers to the rules in effect at the time of the trial court's decision.

[2] We note that it appears that a preliminary hearing was scheduled for August 22, 2002. And respondent was personally served on July 12, 2002, with a notice of this hearing. However, there is no indication in the lower court file as to whether this proceeding occurred other than the fact that the filing of the petition was authorized on the same day.

been convicted of "taking indecent liberties" with one of the children, and that he had not had contact with or given any financial support to the children during the previous two years. But, in this case, we believe that the cumulative effect of this error and those we address below require reversal of the court's order terminating respondent's parental rights. We believe to conclude otherwise would be inconsistent with substantial justice.

Respondent also correctly asserts that the court erred in failing to appoint a guardian ad litem for the children.[3] Where termination of parental rights is sought and the court's jurisdiction over the children is pursuant to MCL 712A.2(b), MCL 712A.17c(7) provides that "the court shall appoint a lawyer-guardian ad litem to represent the child," and such assistance cannot be waived. "Shall" is mandatory language. *Roberts v Mecosta Co Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002). On remand, the court must appoint the children a guardian ad litem if its jurisdiction is grounded in MCL 712A.2(b).

The court further erred in failing to articulate the statutory bases for its order of termination in accordance with MCR 5.974(G)(3). The trial court did state its findings of fact on the record from which the specific bases for its order could be ascertained, but failed to cite the statutory sections on the record or in its order.[4] Additionally, it appears that the trial court misunderstood the burden of proof with respect to the best interest analysis under MCL 712A.19b(5) when it stated that respondent "has failed to provide to the Court by any clear and convincing evidence that termination of his parental rights would not be in the children's best interest." Section 19(b) does not impose a burden on a parent to produce best interest evidence opposing termination. *In re Trejo*, 462 Mich App 341, 352-354; 612 NW2d 407 (2000). It also does not impose a further burden of proof on a petitioner once he has established one or more statutory grounds for termination. *Id*. at 352. Rather, this subsection "permits the court to find from evidence on the whole record that termination is clearly not in a child's best interests." *Id*. at 353.

Accordingly, we hold that the cumulative effect of the above-mentioned errors in this case warrants reversal of the trial court's order terminating respondent's parental rights. We do not address respondent's remaining appeal issues as they have been rendered moot by our

[3] Because of our conclusion that this case must be remanded, we do not address whether respondent has standing to raise this issue. See *In re EP*, 234 Mich App 582, 597-598; 595 NW2d 167 (1999) (respondent lacked standing to challenge alleged ineffectiveness of child's counsel), overruled in part on other grounds *In re Trejo*, 462 Mich App 341 (2000).

[4] We do note, however, that standing alone, this error would not require reversal because a specific articulation would not have facilitated appellate review. See *In re Hensley*, 220 Mich App 331, 334; 560 NW2d 642 (1996).

decision to remand this case for a new trial, beginning with the adjudicative hearing.

Reversed and remanded. We retain jurisdiction.

/s/ Michael R. Smolenski
/s/ David H. Sawyer
/s/ Stephen L. Borrello