STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DYLLAN AGUIRRE, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MICHAEL AGUIRRE,

Respondent-Appellant.

UNPUBLISHED
December 16, 2004

No. 255608
Genesee Circuit Court
Family Division
LC No. 01-114724-NA

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating his parental rights to the minor child. Because the trial court did not clearly err in finding MCL 712A.19b(3)(j) established by clear and convincing evidence, and because the evidence did not establish that termination was clearly not in the child's best interests, we affirm.

Although the trial court's decision refers to the statutory grounds for termination in MCL 712A.19b(3)(b)(i), (j), (k)(iii) and (k)(v), it is not clear that the court found that each of these statutory grounds were established by clear and convincing evidence, apart from subjection (j). We conclude that the trial court erred to the extent that it relied on subsections (b)(i), (k)(iii), and (k)(v), because those subsections plainly apply only if the parent whose parental rights are being terminated committed the act that resulted in the physical abuse or injury to the child. In this case, the court stated that it was unable to determine who physically abused the child. But any error was harmless because petitioner was only required to establish one statutory ground for termination and § 19b(3)(j) was sufficiently established. *In re JK,* 468 Mich 202, 210; 661 NW2d 216 (2003); *In re Powers,* 244 Mich App 111, 118; 624 NW2d 472 (2000).

MCR 3.977(E)(3), as amended in May 2003, permitted the trial court to consider legally admissible evidence introduced at both the adjudicative trial and the dispositional hearing relative to the allegations in the petition that the child was exposed to a physically abusive environment. We are not persuaded that respondent has demonstrated that the trial court's finding of a statutory ground for termination was based on legally inadmissible evidence. *In re CR,* 250 Mich App 185, 207; 646 NW2d 506 (2002). The trial court's inability to identify the perpetrator of the physical abuse did not preclude termination under § 19b(3)(j). That subsection authorizes termination where 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." Regardless of whether respondent directly caused the child's injuries, the trial court did not clearly err in finding that, based on respondent's conduct or capacity, there was a reasonable likelihood the child would be exposed to a physically abusive environment if returned to respondent, thus warranting termination under § 19b(3)(j). MCR 3.977(E) and (J); *In re JK, supra* at 209; *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Also, the trial court did not clearly err in its consideration of the child's best interests. MCL 712.19b(5); MCR 3.977(G)(2) and (J). The evidence did not establish that termination of respondent's parental rights was clearly not in the child's best interests. *In re Trejo,* 462 Mich 341; 612 NW2d 407 (2000).

Respondent's claim that he was denied the effective assistance of counsel is not properly before us because it is not set forth in the statement of questions presented. MCR 7.212(C)(5); *Lansing v Hartsuff,* 213 Mich App 338, 351; 539 NW2d 781 (1995). In any event, limiting our review to the record, respondent has not demonstrated that his substitute attorney's lack of access to a written transcript of the adjudicative trial, as opposed to a video recording, rendered his performance objectively unreasonable or caused the prejudice necessary to succeed on a claim of ineffective assistance of counsel. *In re CR, supra* at 197; *In re Ayres,* 239 Mich App 8, 23; 608 NW2d 132 (1999).

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio