

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JOHNATHON ROBERT
FESSLER, LORETTA WARNKE, NICHOLAS
ANDREW OLLIE, JACOB WILLIAM OLLIE,
and ASHLEY RENE OLLIE, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KATHERINE OLLIE,

Respondent-Appellant,

and

RICHARD OLLIE and SHANE HARRIS,

Respondents.

In the Matter of LORETTA WARNKE,
JOHNATHON ROBERT FESSLER, NICHOLAS
ANDREW OLLIE, JACOB WILLIAM OLLIE, and
ASHLEY RENEE OLLIE, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

RICHARD OLLIE,

Respondent-Appellant,

and

UNPUBLISHED
June 14, 2005

No. 254909
Oakland Circuit Court
Family Division
LC No. 99-616811-NA

No. 255181
Oakland Circuit Court
Family Division
LC No. 99-616811-NA

KATHERINE OLLIE and SHANE HARRIS,

Respondents.

In the Matter of EMERSON OLLIE, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

RICHARD A. OLLIE,

Respondent-Appellant.

No. 257565

Oakland Circuit Court

Family Division

LC No. 99-616811-NA

Before: Talbot, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Respondents-appellants, Katherine Ollie (hereafter “respondent mother”) and Richard Ollie (hereafter “respondent father”), appeal as of right in Docket Nos. 254909 and 255181, respectively, from the trial court’s order terminating their parental rights to Johnathon Fessler, Loretta Warnke, and Nicholas, Jacob, and Ashley Ollie under MCL 712A.19b(3)(b)(i) and (ii), (g), and (j).¹ In Docket No. 257565, respondent father appeals as of right from the trial court order terminating his parental rights to Emerson Ollie under MCL 712A.19b(3)(g), (i), (j), and (l). In Docket Nos. 255181 and 257565, we affirm the trial court’s orders terminating respondent father’s parental rights to each of his children. In Docket No. 254909, we affirm the termination of respondent mother’s parental rights relative to the Ollie children, but only conditionally affirm the termination of respondent mother’s parental rights relative to Johnathon and Loretta and remand for further proceedings to determine whether petitioner can establish the proper notice under the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*

We first address respondents-appellants’ claims regarding the statutory grounds for termination with respect to Johnathon, Loretta, and the three older Ollie children.² We agree that

¹ Respondent Richard Ollie is the biological father of only the Ollie children.

² We note that neither respondent provided this Court with a record of the in camera proceeding at which the trial court questioned two of the Ollie children, despite requests from this Court. Failure to provide a record essential to consideration of an issue on appeal may result in the issue being deemed abandoned on appeal. See MCR 7.210(A) and (B); *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 305; 486 NW2d 351 (1992). The trial court nonetheless

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legally admissible evidence was required to establish the requisite physical abuse under §§ 19b(3)(b)(i) and (ii), inasmuch as this constituted a circumstance new or different from the offense that led the court to take jurisdiction over the five children. MCR 3.977(F)(1)(b). We conclude, however, that respondent mother has not substantiated her claim that legally admissible evidence was lacking. Indeed, respondent mother's cursory treatment of her claim that the trial court relied on inadmissible hearsay to establish the duct-taping abuse of the older children may be deemed insufficient to properly invoke our review of this issue. See *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Further, it is apparent that the trial court's finding of physical abuse was not based solely on the two older children having their mouths duct-taped shut as a form of physical punishment, but also on evidence that respondents forced one of the Ollie children to eat feces. The feces-related abuse was supported by the Ollie child's statements to the trial court during the in camera proceeding, as well as statements made by the Ollie child during his evaluation by John Neumann. Respondent mother does not address the feces-related abuse found by the trial court and, therefore, has not established any basis for disturbing the trial court's finding of physical abuse under §§ 19b(3)(b)(i) and (ii). See *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (an appellant's failure to address a necessary issue precludes appellate relief). Further, we are not persuaded that the trial court clearly erred in finding clear and convincing evidence to establish the other elements of §§ 19b(3)(b)(i) and (ii). MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

With regard to respondent father's challenge to the trial court's findings under §§ 19b(3)(b)(i) and (ii), we are similarly not persuaded that the trial court clearly erred in finding clear and convincing evidence that §§ 19b(3)(b)(i) and (ii) were established with respect to the three Ollie children. MCR 3.977(J); *In re Miller, supra*. We decline to address respondent father's claim that Neumann's testimony regarding Nicholas Ollie's statements constituted inadmissible hearsay, inasmuch as respondent father has inadequately briefed this claim. *Eldred, supra*. Further, respondent father has failed to show that he preserved any challenge to his son's in camera testimony regarding the feces-related abuse on the ground that he was denied the right of confrontation, and no plain constitutional error has been shown. *In re Snyder*, 223 Mich App 85, 92; 566 NW2d 18 (1997). Because a child protection proceeding is not a criminal proceeding, respondent father's reliance on *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), is misplaced. See *In re Brock*, 442 Mich 101, 107-108; 499 NW2d 752 (1993). The material question is whether the trial court correctly applied the due process standards in *In re Brock, supra*, when determining that the two Ollie children could be questioned in chambers. Because respondent father does not address the trial court's decision in this regard, he has not established a basis for relief on appeal. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

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provided a videotape of the in camera hearing, thereby enabling this Court to fully consider this issue, particularly with regard to respondents' challenges to the trial court's determination that legally admissible evidence supported its finding of physical abuse under MCL 712A.19b(3)(b)(i) and (ii).

Because the feces-related abuse alone supports the trial court's finding of physical abuse under §§ 19b(3)(b)(i) and (ii), we find it unnecessary to address respondent father's claim that the duct-taping abuse involving Johnathon and Loretta was not relevant to these statutory grounds. In passing, however, we note that while not relevant to the parental elements of §§ 19b(3)(b)(i) and (ii), the fact that Johnathon and Loretta were not respondent father's biological children did not affect the trial court's ability to consider the duct-taping abuse for other purposes, including its consideration of the other statutory grounds for termination in §§ 19b(3)(g) and (j). See *In re Powers*, 208 Mich App 582, 588; 528 NW2d 799 (1995).

In sum, we hold that neither respondent has shown that the trial court clearly erred in finding that §§ 19b(3)(b)(i) and (ii) were established by clear and convincing evidence. MCR 3.977(J). We further conclude that, although only one statutory ground for termination is required to terminate parental rights, *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003), neither respondent has established any basis for disturbing the trial court's findings with regard to §§ 19b(3)(g) and (j). Respondents' actual compliance, or lack of compliance, with the court-ordered parent-agency agreement, while relevant evidence, was not dispositive of whether the statutory grounds were proven. *In re JK, supra* at 214; *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005). Also, we give deference to the trial court's superior opportunity to decide the weight and credibility of the witnesses who appeared at the termination hearing. *In re Miller, supra* at 337. Thus, the trial court's reliance, in part, on testimony of the foster-care case manager, Janet McDonald, in finding that the statutory grounds for termination were sufficiently established, does not establish clear error.

Finally, limiting our review to the evidence presented to the trial court, *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990), the evidence did not establish that termination of respondents' parental rights was clearly not in the children's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000).

In light of the foregoing, we affirm the trial court's termination of respondents' parental rights to the three older Ollie children. But we only conditionally affirm the termination of respondent mother's parental rights with respect to Johnathon and Loretta because the trial court did not take appropriate steps to satisfy the ICWA with regard to these children. The trial court erred in finding that the notice sent to the Michigan Indian Child Welfare Agency (MICWA) satisfied the ICWA's requirements. MCR 3.980(A)(2); *In re IEM*, 233 Mich App 438, 448; 592 NW2d 751 (1999); see also *In re TM (After Remand)*, 245 Mich App 181, 188; 628 NW2d 570 (2001). The trial court should have received petitioner's proffered evidence, over respondent mother's attorney's objection, regarding the various notices mailed in October 2003 concerning Johnathon's Cherokee Indian heritage to determine if there was compliance with the ICWA. The trial court also should have reviewed the information received by petitioner from the MICWA concerning Loretta's Cherokee Indian heritage to determine if there was substantial compliance with the ICWA. *Id.* at 188-189. Because the identity of the Cherokee tribe for Loretta was not known, it was sufficient that the Minneapolis Area Director, Bureau of Indian Affairs, receive actual notice. *In re IEM, supra* at 448 n 4; *In re TM (After Remand), supra*.

We decline petitioner's offer of documentation in this appeal to establish compliance with the ICWA with regard to Johnathon and substantial compliance with regard to Loretta. Although this Court has discretion to permit additions to the record, MCR 7.216(A)(4); *People v Nash*, 244 Mich App 93, 99-100; 625 NW2d 87 (2000), we find petitioner's proffered

documentation incomplete with respect to the notice received by the MICWA from the Bureau of Indian Affairs. A remand would also provide an opportunity for the trial court to rule on any objections that respondent mother might raise to the documentation. Therefore, we conditionally affirm the trial court's termination order relative to Johnathon and Loretta and remand this case to the trial court, which shall determine the question of compliance with the ICWA under the applicable standards in *In re IEM* and *In re TM (After Remand)*, *supra*. If petitioner establishes compliance with the ICWA, the order terminating respondent mother's parental rights to Johnathon and Loretta shall be affirmed. If petitioner is unable to establish compliance, the trial court shall fashion the appropriate remedy that may include a redetermination as to Johnathon and Loretta.

Finally, we address respondent father's challenge to the trial court's order terminating his parental rights to his youngest son, Emerson Ollie, who was born while the other three Ollie children were already within the trial court's jurisdiction. After reviewing the record, we find merit to the position of both petitioner and the minor child's guardian ad litem that respondent father consented to the termination order. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). At a minimum, it is clear that respondent father waived a best interests hearing. A waiver extinguishes any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

But even if the respondent father did not consent, we would not reverse the trial court's order terminating his parental rights to Emerson. Because respondent father's parental rights were terminated at the initial dispositional hearing, the trial court was required to find statutory grounds for termination based on clear and convincing, legally admissible evidence introduced for his no contest plea. MCR 3.977(E)(3). The trial court was only required to make brief, definite, and pertinent findings and conclusions on contested matters. MCR 3.977(H)(1).

The trial court's decision reflects that it was based on judicial notice of its findings made with respect to the older Ollie children and its order terminating respondent father's parental rights to those children. Because there were no contested matters requiring additional findings, the trial court's findings with respect to the statutory grounds for termination were adequate. Further, the trial court did not clearly error in finding clear and convincing evidence, based on the judicially noticed record, for the statutory grounds for termination. MCR 3.977(J); *In re Miller*, *supra* at 337. Because no evidence was offered with regard to Emerson Ollie's best interests, no additional findings were required. *In re Gazella*, *supra* at 678. The trial court did not err in terminating respondent father's parental rights to Emerson. *Id.*; MCL 712A.19b(5).

Affirmed in part, conditionally affirmed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Brian K. Zahra

/s/ Pat M. Donofrio