

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ARIANA JANICE GREEN,
DAJUAN ABRAM PULLEN, COURTNEY
LACEY ROSS, DEJA GRACE ABLE, and
DARRYLE KENNETH ABLE, JR., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

GENEUAL ABRAM PULLEN,

Respondent-Appellant,

and

KATRINA BEATRICE GREEN, ARTAKA
LAVET ROSS, and DARRYLE KENNETH
ABLE, SR.,

Respondents.

Before: Bandstra, P.J., and Hoekstra and Borrello, JJ.

PER CURIAM.

Respondent-appellant appeals by delayed leave granted from the trial court's order terminating his parental rights to his two minor children under MCL 712A.19b(3)(h). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1)(b).

Respondent-appellant is currently incarcerated for a narcotics offense, with an early release date in 2006. In 1993, respondent-appellant was incarcerated for felonious assault and felony firearm, based on a 1987 incident in which he shot at a police officer during a foot chase. Respondent-appellant escaped in 1995. While on escape status, respondent-appellant was convicted of the delivery of cocaine in Washtenaw County under the alias Eric Jackson. He was sentenced to lifetime probation. In 1998 he was apprehended and reincarcerated in Wayne County, and in June 1999 he was convicted of the narcotics offense for which he is currently

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incarcerated. While in prison, respondent-appellant has received misconduct charges for escape, use of marijuana, and disobeying a direct order.

According to respondent-appellant's testimony, the minor children lived with him until his most recent incarceration in December 1998. Upon his incarceration, they lived for several weeks with his fiancée, who then returned them to the care of their mother. In the year that followed, the children's mother was arrested for a drug offense, failed to cooperate with Families First services that were offered, and she became homeless, leading to the children becoming temporary wards of the state. The whereabouts of the children's mother was unknown at the termination trial. Although the children were initially placed with a paternal aunt, she decided that she could no longer care for them. Respondent-appellant had suggested that another of his sisters could care for the children, but that individual had not followed through with petitioner.

The trial court did not clearly err by finding that the statutory grounds for termination set forth in MCL 712A.19b(3)(h) were established by clear and convincing evidence. MCR 5.974(I);¹ *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). It is undisputed that respondent-appellant will be incarcerated until at least the year 2006. Clearly, respondent-appellant's incarceration will deprive the children of a normal home for at least two years. The evidence also clearly and convincingly demonstrated that respondent-appellant has failed to provide for the children's care and custody. At the termination trial, respondent-appellant offered no plan to provide for the proper care and custody of the children. Therefore, the trial court did not clearly err by terminating respondent-appellant's parental rights under MCL 712A.19b(3)(h).

Respondent-appellant claims that he was denied the constitutional right to counsel² because he was not provided with appointed counsel until May 2001, more than one year after proceedings began in this matter. The constitutional guarantees of due process and equal protection extend the right to counsel to respondent-appellants in termination proceedings. *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000). However, this right arises only when a petition for termination has been filed or the court has otherwise indicated that termination is a possibility. *In re Nash*, 165 Mich App 450, 458; 419 NW2d 1 (1987). Thus respondent-appellant in this matter was not entitled to counsel until August 15, 2001, when the court directed that a petition for permanent custody be filed. Furthermore, any possible error in this regard was harmless. *In re Hall*, 188 Mich App 217, 222-223; 469 NW2d 56 (1991). The determinative facts in this case were respondent-appellant's lengthy future incarceration and his failure to have any plan for the care of the minor children. There is no basis to conclude that the outcome might have been different if counsel had represented respondent-appellant during the earlier part of the

¹ Effective May 1, 2003, the court rules governing proceedings regarding juveniles were amended and moved to the new subchapter 3.900. The court rule provision setting forth the "clearly erroneous" standard of review is now found in MCR 3.977(J).

² Respondent has not asserted the right to counsel as set forth in MCR 5.915(B), now MCR 3.915(B). We therefore decline to consider petitioner's argument that respondent was not entitled to counsel because, as a putative father, he was not a "respondent" within the meaning of the court rules.

case. Importantly, respondent-appellant was represented by counsel at the termination trial and concedes on appeal that this representation was “more than adequate.”

We further conclude that respondent-appellant was not denied due process because he was represented by three different attorneys, or by the trial court’s erroneous determination that he had waived the right to have trial before a judge. We so conclude because we find that the risk of an erroneous result was not increased by the fact that the termination trial was held before a referee instead of a judge, or by respondent-appellant’s representation by several different attorneys. See *Mathews v Eldridge*, 424 US 319, 334-335; 96 S Ct 893; 47 L Ed 2d 18 (1976); *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001). Moreover, a review of the record indicates that the termination trial was fair and complete and respondent-appellant was vigorously and well represented.

We affirm.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

/s/ Stephen L. Borrello