

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ALEXANDER HINOJOSA, JR.,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ALEXANDER HINOJOSA,

Respondent-Appellant,

and

MALINDA ROBINSON,

Respondent.

UNPUBLISHED

March 12, 2009

No. 287436

Oakland Circuit Court

Family Division

LC No. 07-736997-NA

Before: Murray, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

Respondent-appellant Alexander Hinojosa appeals of right from the trial court's order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(a)(ii) [desertion of a child for at least 91 days], (g) [failure to provide proper care or custody irrespective of intent, with no reasonable likelihood of an ability to do so in a reasonable time given the child's age], and (j) [reasonable likelihood the child will suffer harm if returned to the parent's home]. We affirm.

I. Factual & Procedural History

The petition involving this minor child and his two older siblings was initiated when his mother left the children without adult supervision at a domestic violence shelter and her whereabouts could not be immediately determined. Respondent also initially could not be located because he was out-of-state, reportedly seeking employment. When contacted, respondent indicated his belief that the children's mother had resumed her use of illegal drugs and was spending the money he allegedly forwarded to her to procure drugs rather than provide a home for the children.

Although counsel represented respondent during the proceedings, respondent's physical presence and participation was not consistent, notwithstanding the trial court's rescheduling of several hearings at his request. Respondent failed to appear for a court-ordered psychological evaluation. During the proceedings, petitioner introduced evidence demonstrating respondent's long and extensive criminal history and imprisonment for drug trafficking, domestic violence, weapon offenses and other charges. Notably, respondent had been in jail during an earlier involvement with protective services when the minor child was first placed in foster care, and again spent time in jail during a portion of these proceedings due to his arrest on new charges. Despite the provision of services and financial assistance to the mother and respondent after their initial involvement with protective services, the minor children were again placed in protective custody less than a year after they returned to their mother and respondent's custody. Ultimately, the minor subject of this petition spent a significant portion of his young life in foster care, without the ongoing or daily involvement of his mother or respondent.

II. Statutory Grounds for Termination

Respondent argues that the trial court clearly erred, and improperly shifted the burden of proof, in finding that the statutory grounds for termination were established by clear and convincing evidence. Petitioner had to prove only one statutory ground for termination. *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000). We review for clear error a trial court's finding that a statutory ground for termination was proven by clear and convincing evidence. MCR 3.977(J); *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003). We defer to the trial court's special opportunity to judge the weight of the evidence and the credibility of the witnesses who appeared before it. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). We review de novo legal issues concerning the proper procedure for terminating parental rights. *In re CR*, 250 Mich App 185, 200; 646 NW2d 506 (2001).

Both respondent and the child's mother were respondents to the petition requesting court jurisdiction over the child and termination of parental rights. Although the adjudicative jury trial conducted with respect to the mother sufficed for the court to exercise jurisdiction over the child, *In re CR*, *supra* at 205, petitioner still had the burden of proving by legally admissible evidence a statutory ground warranting termination of respondent's parental rights. MCR 3.977(A)(3), (E)(3), (F)(1)(b). And once a statutory ground for termination is proven, the trial court has to consider the child's best interests. MCL 712A.19b(5).

Here, the trial court issued separate decisions regarding the statutory grounds for termination and the child's best interests. Although respondent asserts that the trial court improperly shifted the burden of proof to him to disprove the existence of a statutory ground for termination, he supports his argument only by citing remarks the court made in the context of considering the child's best interests. Because those remarks did not relate to the trial court's consideration of the statutory grounds for termination, they do not support respondent's claim. The trial court had previously found that petitioner established the statutory grounds for termination by clear and convincing evidence. The trial court appropriately noted concerns regarding whether certain aspects of respondent's out-of-court statements found support in other evidence, considering their hearsay nature. MRE 801(c), MRE 802. Furthermore, although any such statements offered by petitioner would not constitute hearsay, MRE 801(d)(2)(A), the record does not reflect that the truth of each statement, in particular respondent's statements regarding his employment, qualified as material to petitioner's case.

We also reject respondent's contention that uncontroverted testimony proved his employment. Rather, the record indicates that respondent's counsel introduced, through the testimony of respondent's adult daughter, respondent's hearsay statements to controvert petitioner's evidence. Examined in this context, the trial court's concern regarding the lack of evidence to support respondent's self-serving statements was not improper because the trial court was entitled to weigh the evidence and consider the legally admissible purposes of the evidence, in determining if petitioner met its burden of proof.

With respect to the specific statutory grounds for termination, the factual basis for the trial court's reliance on § 19b(3)(a)(ii) appears unclear. But the trial court did not clearly err in finding that petitioner proved §§ 19b(3)(g) and (j) by clear and convincing evidence, so any error in relying on § 19b(3)(a)(ii) as an additional ground for termination is harmless.

The evidence concerning the circumstances of the child being taken into custody at a shelter, after respondent left him in the mother's care, establishes that he failed to provide proper care or custody. And regardless whether respondent had a legal source of income at the time of the hearing on June 27, 2008, the evidence supports the trial court's finding that no reasonable expectation existed that respondent could provide the child proper care and custody within a reasonable time, considering the child's age. According to the caseworker, respondent admitted that he could not plan for the child's care. Respondent's nonappearance at the June 27, 2008 hearing was also material and probative in this regard, given that the hearing was intended to determine the appropriate disposition for the child. As the trial court observed in its earlier April 11, 2008 decision, respondent's failure to appear speaks to his lack of intent or motivation to provide proper care and custody for the child.

Considering respondent's admission to the caseworker together with his nonappearance, and the evidence of his ongoing criminality, which included a domestic violence conviction in 2007, the trial court did not clearly err in finding that petitioner established by clear and convincing evidence the propriety of termination under § 19b(3)(g). We reach this same conclusion with respect to § 19b(j), particularly considering respondent's recent domestic violence conviction.

III. Best Interests Determination

Next, we find no basis for disturbing the trial court's June 27, 2008 decision regarding the child's best interests. MCL 712A.19b(5); *In re JK*, *supra* at 209. The trial court's June 27, 2008 decision fulfilled its duty under MCL 712A.19b(1) to state findings of fact and conclusions of law. Although the order terminating respondent's parental rights did not formally enter until July 31, 2008, the purpose of that order was to effectuate the court's prior decision. The order was necessary because a court speaks through its judgments and decrees, not through its oral statements or written orders. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). Accordingly, we are not persuaded that the court had to apply the modified best interests standard in MCL 712A.19b(5), as amended by 2008 PA 199, effective July 11, 2008. The effective date is not dispositive of whether a provision is given prospective or retroactive application. *Selk v Detroit Plastic Products (On Resubmission)*, 419 Mich 32, 35 n 2; 348 NW2d 652 (1984). "Amendments are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent." *Tobin v Providence Hosp*, 244 Mich App 626, 661; 624 NW2d 548 (2001).

Regardless, the record discloses that the trial court found termination appropriate under both the former and current versions of § 19b(5). In addition to determining that the evidence did not clearly show that termination would contravene the child's best interests, the trial court also affirmatively found clear evidence that termination served the child's best interests, and we find no clear error in either decision. *In re JK, supra* at 209; see also *In re Trejo*, 462 Mich 341, 356; 612 NW2d 407 (2000). Therefore, the trial court did not err in terminating respondent's parental rights to the child.

Affirmed.

/s/ Christopher M. Murray

/s/ Elizabeth L. Gleicher

/s/ Michael J. Kelly