STATE OF MICHIGAN

COURT OF APPEALS

In re JAVONTE THOMPSON and JA'COREY THOMPSON, Minors.

UNPUBLISHED
April 18, 1997

DEPARTMENT OF SOCIAL SERVICES,

Petitioner-Appellee,

v

JERMAINE THOMPSON,

Respondent-Appellant,

and

CRYSTAL ROBINSON,

Respondent.

No. 195790
Kalamazoo Juvenile Court
LC No. 96-000011-NA

DEPARTMENT OF SOCIAL SERVICES,

Petitioner-Appellee,

v

CRYSTAL ROBINSON,

Respondent-Appellant,

and

JERMAINE THOMPSON,

Respondent.

No. 195830
Kalamazoo Juvenile Court
LC No. 96-000011-NA

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

In docket number 195790 of this consolidated appeal, respondent Jermaine Thompson appeals as of right the termination of his parental rights to Javonte Thompson and Ja'Corey Thompson pursuant to MCL 712A.19b(3)(b)(i) and (ii); MSA 27.3178(598.19b)(3)(b)(i) and (ii) (parent causes or fails to prevent physical injury). In docket number 195830, respondent Crystal Robinson appeals as of right the termination of her parental rights to the same children on the same grounds. We affirm.

Respondent Robinson argues that the 1995 amendments to MCR 5.974(D) remove all discretion from the trial court and make termination a requirement, thereby violating the legislative policy of reunification expressed in MCL 712A.1(2); MSA 27.3178(598.1)(2). However, in terminating respondent Robinson's parental rights, the record is clear that the trial court relied on the version of MCR 5.974(D) that was in force before it was amended in 1995. Accordingly, we decline to consider respondent Robinson's argument. Moreover, even if we consider the argument, we conclude that it is without merit. The staff comment to the MCR 5.974 explains that 1995 amendments were a response to the enactment of 1994 PA 264, which, in part, amended MCL 712A.19b; MSA 27.3178(598.19b) effective January 1, 1995, by adding the following subsection:

> (5) If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent shall not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interest. [MCL 712A.19b(5); MSA 27.3178(598.19b)(5).]

In *In re Hall-Smith*, ___ Mich App ___; ___ NW2d ___ (Docket No. 195833, issued 3/25/97), this Court stated as follows concerning the enactment of § 19b(5):

> [U]se of the term "shall" rather than "may" indicates a mandatory rather than discretionary action.
>
> Given the Legislature's use of the words "shall" and "unless" in the above provision, we interpret the above statute to now create a mandatory presumption which can only be rebutted by a showing that termination is clearly not in the child's best interest. If no such showing is made and a statutory ground for termination has been established, we believe that the trial court is without discretion and must terminate parental rights. Accordingly, we believe that a trial court's now non-discretionary decision regarding termination is reviewed in its entirety for clear error.

> Although the burden of proof remains with the petitioner to show that a statutory ground for termination has been met by clear and convincing evidence, MCR 5.974(A)(3) and (F)(3), we believe that the burden of going forward with evidence that termination is clearly not in a child's best interests rests with the respondent. In *In re Miller*, 433 Mich 331, 345; 445 NW2d 161 (1989), our Supreme Court discussed a parent's burden of going forward with evidence that they would be able to reestablish a proper home for the child as discussed in then 1972 PA 59, § 19a(f), the statute under which termination was sought. In that case, the Court made the following distinction between the burden of proof and the burden of going forward:
>
> "Although the burden of proof is on the party seeking to terminate parental rights, the burden of going forward with the evidence is on the parent or parents. A parent who fails to produce any evidence risks an adverse ruling on the evidence presented, but one who produces some indication that the family situation has improved has met the burden of going forward. Meeting the burden of production, however, does not mean that the parent has necessarily prevailed." [citations omitted.]
>
> Similarly, we believe that once a statutory ground for termination has been met by clear and convincing evidence, the language of MCL 712A.19b(5); MSA 27.3178(598.19b)(5) requires a parent to put forth at least some evidence that termination is clearly not in the child's best interest. Absent any evidence addressing this issue by the parent, termination of parental rights is mandatory.

Accordingly, contrary to respondent Robinson's argument, by enacting MCL 712A.19b(5); MSA 27.3178(598.19b)(5), the Legislature has signaled its intention to forego additional efforts at family reunification and to make termination of parental rights mandatory in the circumstances outlined in *Hall-Smith.*

Next, respondent Robinson argues that the trial court's findings of fact with respect to the grounds for termination were without factual support. We disagree. Evidence was introduced indicating that respondent Robinson had herself physically abused Javonte, and that she hid Javonte and failed to seek medical treatment for his many injuries to protect herself and respondent Thompson. Thus, clear and convincing evidence supporting the statutory ground for termination was presented. We assume that respondent Robinson put forth at least some evidence indicating that termination was not clearly in the best interests of the children where the trial court noted that respondent Robinson's mother had given testimony about "the outward appearances of love and nurturing and support exhibited by her daughter . . . ." We further assume that the production of this evidence precluded mandatory termination of respondent Robinson's parental rights. *Hall-Smith*, *supra*. However, despite this evidence, the trial court found that respondent Robinson's apparent inability to make independent decisions about the care and protection of the children was not likely to change in the foreseeable future Given Javonte's living situation and the severity and history of his injuries, we conclude that this finding was not clearly erroneous. *Id*. See also *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).

We find no abuse of discretion in the court's decision to terminate respondent Robinson's parental rights. *Hall-Smith, supra*; *Conley, supra* at 44-45.

Finally, respondent Thompson argues that the trial court's findings of fact with respect to the grounds for termination were clearly erroneous. Specifically, respondent Thompson contends that there was no direct evidence that he was responsible for Javonte's injuries or that he was aware of the seriousness of Javonte's injuries. We disagree. Again, clear and convincing evidence of the statutory grounds for termination was presented. A police officer testified that respondent father stated that he was responsible for disciplining the children, which included hitting the children with his hand or a belt, that a few nights before the police took Javonte he had beat Javonte with a belt while he was intoxicated, and that he did not seek medical treatment for Javonte's injuries because he was afraid that he and respondent Robinson would get into trouble. Respondent Robinson testified that during this same time period she observed respondent Thompson hit Javonte with a belt in the middle of the night, and that the next morning Javonte was bruised and crying. Contrary to respondent Thompson's assertion, respondent Robinson's testimony concerning her observations of his actions was not inadmissible hearsay. See MRE 801. Accordingly, we conclude that the trial court's findings that respondent Thompson both caused and failed to prevent Javonte's injuries were not clearly erroneous. Because respondent Thompson failed to put forth evidence from which the trial court could conclude that termination was clearly not in the best interests of the children, the trial court's now-mandatory decision to terminate respondent Thompson's parental rights complied with the requirements of § 19b(5), and we find no clear error in that decision. *Hall-Smith, supra*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Michael R. Smolenski