

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ASHLEY NICOLE DAVIS, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

BILLY GENE DAVIS,

Respondent-Appellant,

and

STACEY ALLYN MORTIMER DAVIS,

Respondent.

UNPUBLISHED

November 25, 1997

No. 200651

Wayne Juvenile Court

LC No. 89-280436

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

STACEY DAVIS,

Respondent-Appellant,

and

BILLY DAVIS,

Respondent.

No. 200787

Wayne Juvenile Court

LC No. 89-280436

Before: Jansen, P.J., and Fitzgerald and Young, JJ.

PER CURIAM.

Respondents appeal as of right from the juvenile court order terminating their parental rights to the minor child. We affirm.

Respondent Billy Davis first argues that the court erred in terminating his parental rights under MCL 712A.19b(3)(i); MSA 27.3178(598.19b)(3)(i) because there was not clear and convincing evidence to support termination under that ground. We agree. Subsection (3)(i) provides:

(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

Here, the record is completely devoid of any evidence that respondent Billy Davis had his parental rights terminated to a sibling of Ashley. Accordingly, the court clearly erred in finding clear and convincing evidence to support termination of respondent Billy Davis' parental rights under subsection (3)(i). *In re Hall-Smith*, 222 Mich App 470, 472; 564 NW2d 156 (1997).

Respondent Billy Davis next argues that the court erred in terminating his parental rights under subsection (3)(h) where there lacked clear and convincing evidence to support termination on this basis. We again agree. Subsection (3)(h) provides:

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.

The focus is whether the imprisonment will deprive a child of a normal home for two years in the future. *In re Neal*, 163 Mich App 522, 527; 414 NW2d 916 (1987). The record reveals that respondent's earliest outdate was April 14, 1997, less than five months following the November 21, 1996 hearing. Accordingly, the court clearly erred in finding clear and convincing evidence to support termination under subsection (3)(h). *In re Hall-Smith*, *supra*.

Finally, respondent father argues that the court erred in terminating his parental rights under subsection (3)(g). We disagree. This subsection provides:

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.

The record reveals that respondent Billy Davis failed to provide proper care or custody since he was incarcerated and left Ashley in the hands of her mother who was clearly unable to care for her.

Moreover, the record reveals no reasonable expectation that respondent will be able to provide proper care and custody within a reasonable time considering Ashley's age. Ashley was 2-1/2 years old at the time of the hearing. The record indicated that respondent would be released from prison, at the earliest, five months following the termination hearing. He then had to abide by a treatment plan. There was testimony that respondent has not indicated that he has a source of income or place to live upon his release from prison. There was also testimony that respondent beat Ashley's mother with a hammer and baseball bat and caused her to have her spleen removed. Respondent's mother advised against placing Ashley with respondent. Accordingly, we are unable to say that the juvenile court clearly erred in finding clear and convincing evidence to support termination of respondent's parental rights under subsection (3)(g). Moreover, respondent failed to show that termination was clearly not in the child's best interest. *In re Hall-Smith, supra*, p 473.

Respondent Stacey Davis argues that the juvenile court erred in terminating her parental rights under subsection (3)(g). However, this issue is moot. *Michigan National Bank v St. Paul Fire and Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997). Respondent Stacey Davis' parental rights were also terminated pursuant to subsection (3)(i) and (j). Therefore, even assuming the lower court erred in terminating her parental rights under subsection (3)(g), it is irrelevant since respondent's parental rights were also terminated under two other subsections which she is not appealing.

Affirmed.

/s/ Kathleen Jansen

/s/ E. Thomas Fitzgerald

/s/ Robert P. Young, Jr.